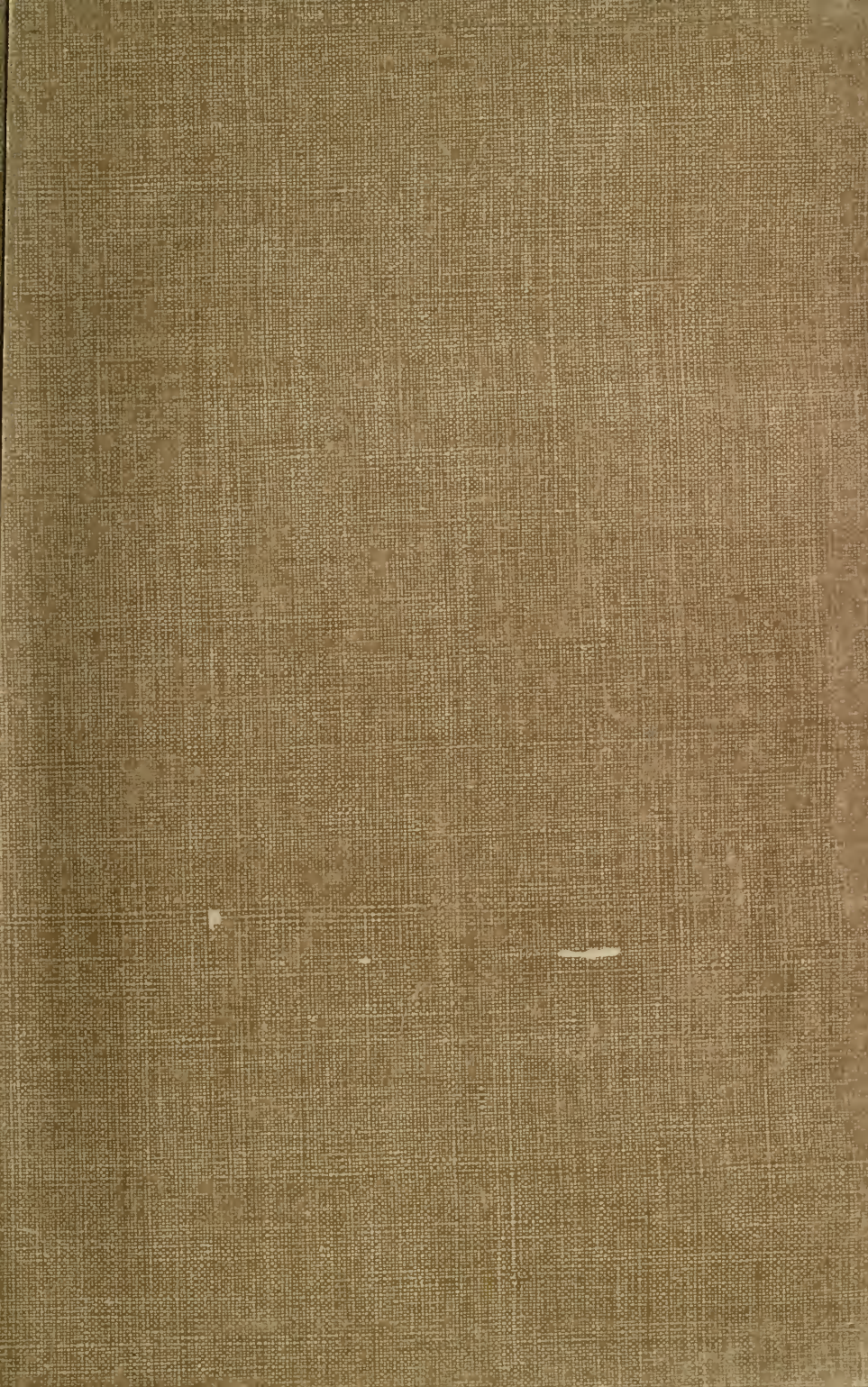




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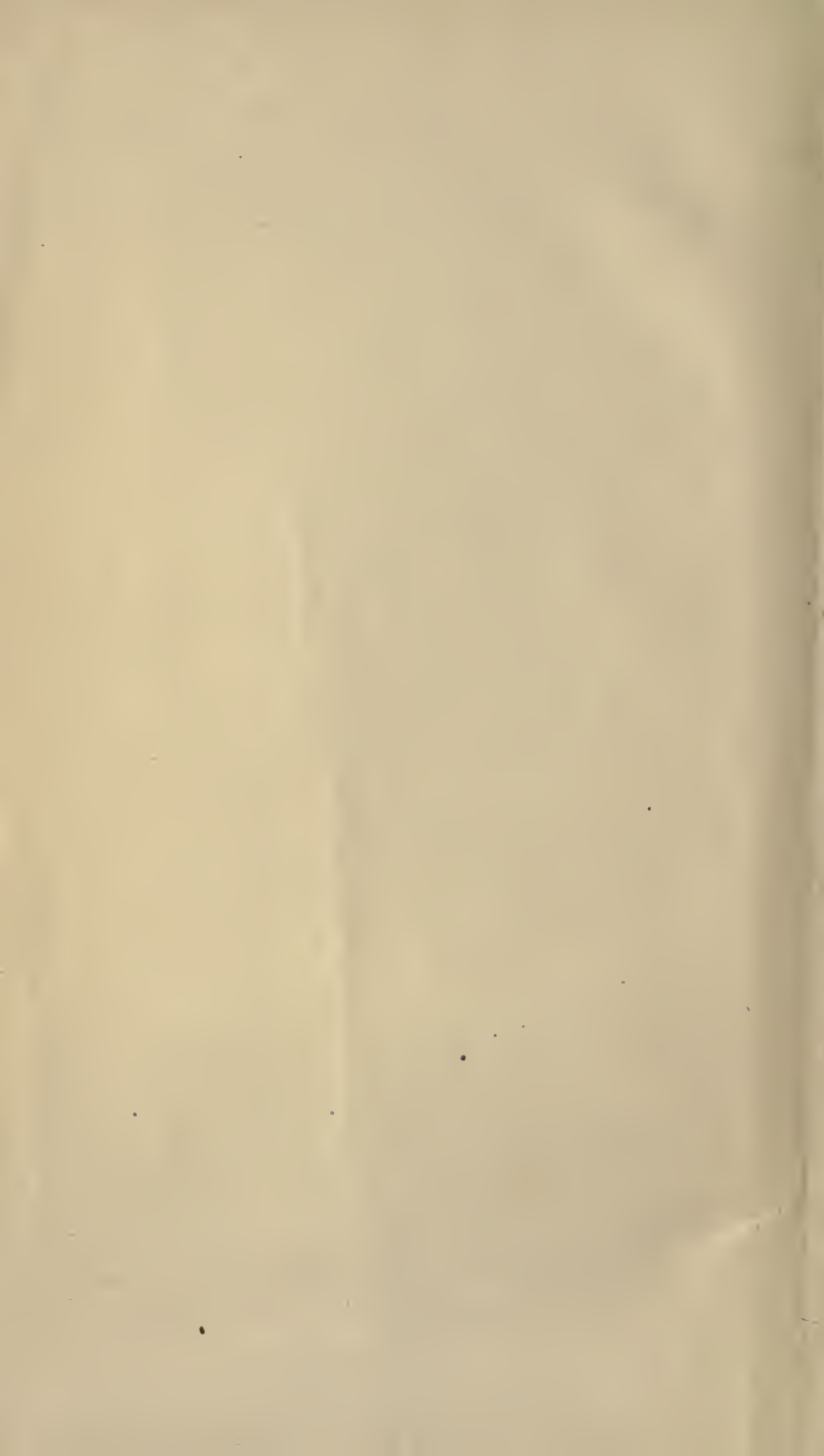
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A REVIEW
IN
LAW AND EQUITY
FOR
LAW STUDENTS

TOGETHER WITH
A SUMMARY OF THE RULES REGULATING ADMISSION TO
PRACTICE THROUGHOUT THE UNITED STATES

A HAND-BOOK FOR LAW STUDENTS

BY
GEORGE E. GARDNER
OF THE MASSACHUSETTS BAR

NEW YORK
BAKER, VOORHIS & COMPANY

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TO MY FATHER

P R E F A C E .

THIS book, as its title indicates, is designed for students who are making their final preparations for admission to the Bar. Incidentally it may be found useful throughout the period of study. It aims at a clear and concise statement of the leading principles of those branches of the law which are seriously taught in the law schools of the country and which form the subjects of Bar examinations. The book is short, and designedly so. The value of a work of this character, roughly speaking, varies inversely as its length. Brevity, clearness, and simplicity have been constantly in mind in its preparation. Real Property is ordinarily the source of the student's chief difficulty, and special care has been taken to make the discussion of this subject clear by an abundant use of illustrations, which have also been freely used elsewhere. While the Statute of Uses and the treatment which it received at the hands of the courts, Fines, Common Recoveries, the Canons of Descent, and the Action of Ejectment as a means of trying a title to land, are of course largely obsolete, they, and similar subjects, are not merely a matter of curious interest to the student of legal history, but they still occupy a prominent place in the examinations for admission to the Bar in many States. Whether profitably or not, is a question with which the candidate has little concern. The difficulty in such subjects lies largely in their obscure statement, an obscurity from which even Blackstone is not wholly free. It is hoped

that the illustrations herein used may be of some assistance in such matters. The general law of contracts, particularly that of negotiable instruments, has been stated at some length, as has also that of Personal Property, Equity, Pleading, and Evidence, and it is believed that the summary of the law of Torts and Crimes is sufficient for the end in view. The book contains a chapter on Quasi-Contracts, a subject which has come to occupy a prominent place in the courses of study of many law schools, and which so far as the writer knows has hitherto received little attention in works of this class.

Substantially every statement in the text has been verified by an examination of authorities which are fully cited and which ought to add substantially to the book's availability. The collection of rules regulating admission to the Bar throughout the United States may be of interest to those who are uncertain as to their location in practice, and perhaps of value generally to those who are concerned in legal education.

From a somewhat extended use of the material which has gone into this book with graduates of law schools and office-bred students, the writer feels safe in saying that a candidate who, after a sufficient period of study, finds himself master of its contents, will have little difficulty with any examination for admission to the Bar to which he is likely to be subjected.

WORCESTER, *November*, 1894.

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CHAPTER I.

INTRODUCTION.

Law, in its broadest sense, signifies a *rule* of action. In its *legal* sense it includes

1. International law.
2. The civil law.
3. Municipal law.

1. **International law** is that system of jurisprudence which defines the *rights* and prescribes the *duties* of nations in their intercourse with one another.¹

2. **The civil law** is that system of jurisprudence which was developed by the *Roman* Republic and Empire.² Our completest knowledge of it is derived from the *Code*, *Institutes*, and *Pandects* formulated and collected in the reign of *Justinian* (A.D. 530–533).³ The civil law forms the foundation of the jurisprudence of Europe and of the State of Louisiana. It is famous for its enlightened equity, and many of its principles have been incorporated into English and American jurisprudence.⁴

3. **Municipal law** is a rule of *civil action* prescribed by the supreme power of a State.⁵

¹ 1 Kent Comm. 1; Polson, Sect. 1, § 1. For other definitions, see Pomeroy on International Law, p. 2.

² Bouvier, Law Dict.

³ Hadley, Introduction to Roman Law, 6; 1 Kent Comm. 538.

⁴ Lane v. Cotton, 12 Mod. 482; Bouvier, Law Dict., Civil Law.

⁵ 1 Bl. Comm. 44; 1 Kent Comm. 447.

Civil action is the action of an *individual* in his capacity as a *member of society*.

Every municipal law in theory contains *four* parts:

1. The *declaratory*, in which are defined the *rights* to be observed or the *wrongs* to be avoided.

2. The *directory*, in which the observance of the rights and the avoidance of the wrongs are enjoined.

3. The *remedial*, which points out the remedy to be pursued by the injured party.

4. The *vindictory*, which contains the *penalty* to be imposed upon the violator of the law.

The *municipal law* of the British Empire and of the United States consists of:¹

I. The unwritten or common law.

II. The statute law.

I. **The common law** is the *will* of a community as expressed by the *customs* and usages which have governed the actions of men for an indefinite period, the *record* of which is contained in the *decisions* of courts of justice and in the *commentaries* of men learned in the law.

In the United States the common law includes that portion of the statute law of England which was in force when independence was gained, and which was applicable to our changed condition.² Such a statute was that of 13 Eliz. (1571) against conveyances of land in fraud of creditors.

Customs are of two kinds:

1. *General* customs, which prevail throughout the State of whose law they are a part.

2. *Particular* customs, which are confined to some particular locality.

¹ 1 Bl. Comm. 61.

² Van Ness v. Packard, 2 Pet. 144; Heirs of Girard v. Philadelphia, 4 Rawle 333; Morgan v. King, 30 Barb. 9; Commonwealth v. Knowlton, 2 Mass. 534; Lorman v. Benson, 8 Mich. 18.

A distinction is sometimes made between a custom and a usage, in that the former is *local*, while the latter is *personal*, and has no reference to locality.¹ The usage is the legal evidence of the existence of a custom.²

There are *seven* requisites for a good custom. It must be

1. *Immemorial*.

2. *Continuous*,—*i. e.*, the right must exist constantly, though it need not be continually exercised.

3. *Peaceable*.

4. *Reasonable*.

5. *Certain*.

6. *Compulsory*, *i. e.*,—it must be of binding obligation on all upon whom it operates.

7. *Consistent* with other customs.

II. A statute is an expression of the *will* of a community through the medium of a lawfully constituted *legislative body*.³

Statutes are divided into

1. *General*, or *public*,—*i. e.*, those which are binding on the whole community.

2. *Special* or *private*,—*i. e.*, those operating on particular individuals only.

The courts take judicial notice of the former; the latter must be pleaded specially.⁴

Statutes are also divided into

1. *Enlarging*, or *enabling* statutes, which increase the scope and action of the Common Law.

2. *Restraining*, or *disabling* statutes, which curtail the scope and action of the Common Law.⁵

Statutes are further divided into

1. *Penal statutes*, or those which impose a penalty on the wrong-doer or violator of the law.

¹ Wilcox v. Wood, 9 Wend. 349. See Browne Us. and Cus. 13.

² Read v. Rann, 10 B. and C. 440.

³ Wilb. St. L. 8.

⁴ 1 Bl. Comm. 86.

⁵ 1 Bl. Comm. 87.

2. *Remedial statutes*, which operate on the *act* of the wrong-doer and not upon his person or property, and which aim to place the parties *in statu quo*.¹

A statute making void a conveyance in defraud of creditors is a remedial statute, while a statute imposing imprisonment for larceny is a penal statute.

By the INTERPRETATION of a law is meant the discovery of the *meaning* intended to be conveyed by the signs and symbols employed in its statement.²

In the interpreting of laws the following five points are to be considered:³

1. *The words*.

2. *The context*,—*i. e.*, one portion of a law may be resorted to for the explanation of another portion.

3. *The subject-matter*. The subject-matter of legislation often casts great light upon the legislation in reference thereto.

4. *The effects and consequences* of the law.

5. *The spirit and reason* of the law.

By the CONSTRUCTION of statutes is meant the *operation* which statutes shall have, when their meaning is ascertained, upon the objects towards which they are directed.⁴

The words interpretation and construction are often used interchangeably, but the distinction just indicated properly exists.⁵

The following are the general rules for the construction of statutes:

1. In the construction of *remedial* and *enlarging* statutes three points are to be considered—

(a). The *condition* of the *law* prior to the passage of the statute.

¹ 1 Bl. Comm. 88 ; Sutherland Stat. Con. §§ 207-208.

² Lieber, Leg. and Pol. Hermeneutics, II.

³ 1 Bl. Comm. 59.

⁴ See Lieber, Legal and Pol. Hermeneutics, 44.

⁵ Bouvier, Law Dict., sub. Construction.

(b). The *mischief*.

(c). The proposed *remedy*.¹

2. *General* words following particular words of enumeration in a statute are construed to apply only to persons or things belonging to the *same rank* or *class* as that to which the persons or things particularly enumerated belong.²

3. *Penal* statutes must be construed *strictly*,—*i. e.*, they are not to be so extended as to embrace cases or acts not clearly described by their words.³

4. Statutes against *fraud*,—*i. e.*, remedial statutes,—are to be construed *freely*.⁴

5. A statute must be construed if possible so as to give force and effect to every part.⁵

6. A saving clause, repugnant to the *body* of a statute, is void.⁶

7. When the common law and a statute conflict, the *latter* prevails, as does also the more recent of two conflicting statutes.⁷

8. If a statute repealing a prior statute is itself repealed, the first statute revives without express words to that effect.⁸ This rule is changed by statute in many States.

9. Acts of a legislative body derogating from the

¹ For Rules 1-10, see 1 Bl. Comm. 87 and cases cited.

² Hill, *ex parte*, 3 C. and P. 225; Foster *v.* Blount, 18 Ala. 687.

³ Hall *v.* State, 20 Ohio 7; Commonwealth *v.* Keniston, 5 Pick. 420; United States *v.* Wiltberger, 5 Wheat. 76.

⁴ Vigo's Case, 21 Wall. 648; First School District *v.* Ufford, 52 Conn. 44; Hudler *v.* Golden, 36 N. Y. 446.

⁵ Matter of N. Y. and Brooklyn Bridge, 72 N. Y. 527-530.

⁶ Att'y-Gen. *v.* Water Works Co., Fitzgibbons 195; Rex. *v.* Justices, 2 B. & Ad. 818.

⁷ *In re* Hickory Tree Road, 43 Pa. St. 139, 142; People *v.* Burt, 43 Cal. 560; Constantine *v.* Constantine, 6 Ves. 100.

⁸ People *v.* Davis, 61 Barb. 456; Commonwealth *v.* Churchill, 2 Met. 118.

power of *subsequent* legislative bodies are void; *i. e.*, a legislature cannot adopt irrevocable legislation.¹

10. Acts of a legislative body impossible of performance are void:²

11. Every statute operates *prospectively* only, unless there is a clear intent that it shall act retrospectively.³

12. Statutes take *effect* at the date of their *passage* unless otherwise provided.⁴

¹ Kelley v. Oshkosh, 14 Wis. 623; Thorpe v. R. & B. R.R. Co., 27 Vt. 149. For limitation of this principle see Dartmouth College v. Woodward, 4 Wheat. 518.

² See Davies v. McNeeby, 5 Nev. 369.

³ 1 Kent Comm. 455 note; Bartruff v. Remey, 15 Iowa 257; Atkinson v. Dunlap, 50 Me. 111; Harvey v. Tyler, 2 Wall. 328, 347.

⁴ Matthews v. Zane, 7 Wheat. 164; Louisville v. Savings Bank, 104 U. S. 469; Baker v. Compton, 52 Texas 252.

CHAPTER II.

GENERAL OUTLINE.

The objects with which the municipal law deals are *rights* and *wrongs*. Rights are divided into

I. The rights of *persons*.

II. The rights of *things*.

The rights of persons are divided into *absolute* rights and *relative* rights.

1. *Absolute rights* are those belonging to an individual by virtue of his being a human being.

2. *Relative rights* are such as belong to an individual by virtue of his being a member of society.

Absolute rights are divided into three general divisions:

A. The right of personal security.

B. The right of personal liberty.

C. The right of private property.

The right of *personal security* consists in a person's legal enjoyment of life, limbs, body, health, and reputation.

(a). Life begins with conception, so far as property rights are concerned; at birth, for purposes of homicide.¹ To cause the death of a child before birth is not a felonious homicide, but is known as abortion, and is commonly punishable by fine and imprisonment.

(b). By *limbs* at common law were meant those portions of a man's body which were *useful* in either offensive or defensive *fighting*.

¹ 1 Bl. Comm. 130; Co. Litt. 36; See *Hull v. Hancock*, 15 Pick. 255; *Harper v. Archer*, 4 Smedes and M. 99.

Mayhem is the destruction of any of these limbs.

At common law to bite off an enemy's ear was not mayhem, but to knock out a front tooth was.

(c). The right to the legal enjoyment of the body is interfered with by *assault* and *battery*.

(d). The right to the legal enjoyment of health is most generally interfered with by the maintenance of a *nuisance*.

(e). The right to the legal enjoyment of *reputation* is interfered with by *slander*, *libel*, or *malicious prosecution*.

B. The right of *personal liberty* consists in the power of *locomotion* from one place to another without restraint except by due course of law. It is interfered with by *false imprisonment*.

C. The right of *private property* consists in the free use and disposition of property, as limited only by the law of the land.

This right is interfered with by any unlawful injury to any form of property, whether by breach of contract or by tort.

An individual can be lawfully deprived of the possession of his property against his will only in case of sale under *legal process*, or by order of court, by a sale under a power of sale in a mortgage, or by the exercise of the right of *eminent domain*.

The latter is the right by which the State, on the ground of public expediency, can take or authorize to be taken, the private property of individuals for public use.¹ Full recompense must, however, be made to the individual whose property is thus taken.²

Relative rights are chiefly those growing out of the relation of

A. *Husband and wife*.

B. *Parent and child*.

¹ West River Bridge Co. v. Dix, 6 How. 536.

² See U. S. Cons. 5th Amend. and State Constitutions.

C. Guardian and ward.

D. Master and servant.

Note.—The principles governing the relations and liabilities of the latter will be stated under Agency.

A. HUSBAND AND WIFE.

Marriage is the relationship arising between a man and a woman who agree to and do live together as husband and wife, this agreement being made in the manner prescribed by law.¹

The contract to marry is the contract by which this relationship is formed. There are *three* essentials to every valid marriage contract.²

(a). *Willingness* to contract.

(b). *Ability* to contract.

(c). An *actual contracting* in the form prescribed by law.

There are *three* disabilities.³

(a). A *prior marriage* of either of the parties, with the husband or wife still living and not divorced. A marriage formed under such circumstances is *void*.⁴

(b). *Nonage* of either party. Such a marriage is *voidable* only, and can be ratified when the parties are of age.⁵

The age at which marriage can be contracted varies in the different States.

(c). *Insanity* or idiocy on the part of either party. Such a marriage is *void*.⁶

There must be actual *intent* on the part of the parties to form the contract.

A marriage *induced by duress or fraud* is *void*.⁷

¹ See Bouv. Law Dict., sub. Marriage. See 1 Bish. Mar. and D., § 3; also Schouler Dom. Rel. § 12.

² 1 Bl. Comm. 434 *et seq.*

³ 1 Bl. Comm. 436 *et seq.*

⁴ 2 Kent Comm. 79, and cases cited.

⁵ See 1 Bish. Mar. and D. § 150.

⁶ 2 Kent Comm. 76.

⁷ Schouler Dom. Rel. § 23, and cases cited.

The performance of a marriage ceremony is *evidence* of marriage, but it is not conclusive, and it may be shown that the ceremony was performed in jest, or that it was intended for private purposes and that an actual marriage was not contemplated.¹

As a general rule, marriages valid in the place where formed are valid everywhere,² unless they are either *bigamous* or *incestuous*.³

The *contract* to marry is not within the *Statute of Frauds*, and need not be in writing.⁴

Marriages may be dissolved in two ways: by *death* and by *divorce*.

Divorce is of two kinds: *a mensa et thoro* and *a vinculo matrimonii*. The latter works a complete dissolution of the marriage; the former dissolves the marriage as far as the parties themselves are concerned, but it permits neither to remarry during the life of the other.

The causes for divorce, alimony, its amount, etc., are regulated by the statutes of the different States, which should be carefully examined by students preparing for the Bar.

The following are the leading consequences of marriage at common law. They are largely changed by the statutes of the different States:

(a). In law the husband and wife were one person, the existence of the wife being merged in that of her husband. As she was supposed to live under his protection, she was termed *femme covert*, and her condition during marriage *coverture*.

(b). From the unity of existence it followed that husband and wife could *make no contract* whatever

¹ *Clark v. Field*, 13 Vt. 460.

² 2 Kent Comm. 91, and cases cited.

³ *Id.* 93; see 1 Bish. Mar. and D. § 372, and cases cited.

⁴ *Browne on Stat. of Frauds*, § 215a.

with each other. A wife could, however, act as attorney for the husband, and the latter could make a valid will in favor of the former.¹

(c). The husband is liable for *necessaries* furnished to the wife when she lives with him as his wife, and when he drives her from his home and refuses to support her. He is *not* liable for necessaries furnished to her when she *elopes* and lives in adultery, if the *fact* of the elopement be *known* to the person furnishing the necessities;² nor if she is living apart from him under an agreement for separate maintenance, and he, in accordance with the agreement, furnishes her an amount sufficient to provide her with the necessaries suitable to her station, this being known to the party with whom she deals.³ This is the prevailing law at present.

Money furnished by a third party to a wife, though expended for necessaries, cannot be recovered from her husband.⁴

(d). At marriage the husband gained an absolute title to all the wife's personal property in possession, with the right to reduce her choses in action to possession, and to have *curtesy* in her estates of inheritance.

(e). The wife gained the right to *dower* in her husband's estates of inheritance, and on his death retained her personal ornaments, jewels, etc., as against her husband's personal representatives. These were called her *paraphernalia*.⁵

(f). On marriage the husband became liable for the wife's debts contracted before marriage, and for her torts committed during marriage.⁶ If the debts of the wife were not paid before her death, however, the husband's liability ceased.⁷

¹ 1 Bl. Comm. 442.

² 1 Bl. Comm. 443; see note and cases cited.

³ 4 Camp. 70; 4 B. and A. 254.

⁴ 1 Salk. 387.

⁵ 2 Bl. Comm. 435.

⁶ 2 Kent Comm. 143, 149.

⁷ *Lamb v. Belden*, 16 Ark. 539; *Cole v. Shurtleff*, 41 Vt. 311.

The relation of husband and wife, and the duties arising from that relation, are regulated by statute in the different States.

These statutes should be consulted by students.

B. PARENT AND CHILD.

Children are of two kinds:

(a). *Legitimate*, or those born in lawful wedlock or within a competent time thereafter.

(b). *Illegitimate*, or children born out of wedlock.

By the Civil, but not by the Common law, the subsequent marriage of the parents legitimized children born prior to the marriage, and this principle has been generally adopted in the United States.¹

At common law an illegitimate child could by no possibility inherit any property, as he was regarded as the son of nobody.

In many of the States an illegitimate child inherits from his *mother* equally with other children.²

The mother of such a child is entitled to its custody in preference to the putative father, while in the case of legitimate children the father is entitled to their custody, unless a court decrees otherwise.³

The duties owed by parents to legitimate children are three.⁴

(a). *Maintenance*.

(b). *Protection*.

(c). *Education*.

These duties cease on the child's coming of age.

At common law a man is not obliged to support the children of his wife by a former marriage.⁵

¹ 1 Bl. Comm. 454, see note; Schouler Dom. Rel. § 226. See *Miller v. Miller*, 91 N. Y. 315.

² See 2 Kent Comm. 212, 213.

³ 5 East. 221; 7 East. 579.

⁴ 1 Bl. Comm. 447; 2 Kent Comm. 189; Schouler Dom. Rel. § 233.

⁵ *Williams v. Hutchinson*, 3 N. Y. 312; *Worcester v. Marchant*, 14 Pick. 510; Schouler on Dom. Rel. § 237, and cases cited.

If, however, he receives them into his home, he is regarded as having adopted them as his children.¹

There are two rules as to the parent's liability for necessities furnished to a child.

1. It is held that a third party furnishing necessities to a child can recover from the parent by merely proving that the articles were purchased and that they were *necessary*.²

2. It is held that the party furnishing the articles must show in addition a *promise* on the part of the parent, either express or implied, to pay for the articles. Where this doctrine is held the courts seize upon slight circumstances from which to infer the promise, such as seeing the child in possession of the articles and allowing him to keep and use them.³

By *necessaries* are meant such articles as are suitable to the social condition and rank in life of him by whom they are used. The term is purely relative.⁴ The question as to what are necessities is for the *court*; as to whether particular necessities were furnished, and the proper amount, for the jury.⁵ Whether an article is a necessary is determined, not by reference to the article, but by reference to the need of the person for that article. Clothing is abstractly a necessary, but in a particular case a person might not *need* a suit of clothes. Here the garments would not be necessities.

Education is classed among the necessities.⁶

¹ *Sharp v. Cropsey*, 11 Barb. 224; *Luney v. Vantine*, 40 Vt. 501.

² *Reynolds v. Sweetser*, 15 Gray 78; *Weeks v. Merrow*, 40 Me. 151; *Fitler v. Fitler*, 33 Pa. St. 50.

³ *Mortimore v. Wright*, 6 W. & W. 482; *Gordon v. Potter*, 17 Vt. 350; *Raymond v. Loyl*, 10 Barb. 483; *Kelley v. Davis*, 49 N. H. 187. This doctrine is much the stronger of the two, and the weight of authority is greatly in its favor. See 2 Kent. Comm. 192; *Schouler Dom. Rel.* § 241, and cases cited.

⁴ *Smith Contr.* 269; *Schouler Dom. Rel.* § 61, and cases cited.

⁵ *Parke v. Kleeber*, 37 Pa. St. 25; *Raynes v. Bennett*, 114 Mass. 424.

⁶ 2 Kent Comm. 192; *Schouler Dom. Rel.* §§ 411, 412.

Torts.—A father is *not liable* in damages for the torts of his child, *provided* they are committed without his knowledge or consent and when the child is not in his employment.¹

A parent is justified in making an *assault* and *battery* for the protection of the person of a child.²

The parent is entitled to the *wages* earned by the child;³ but if an employer has been accustomed to pay the wages to the child without remonstrance on the part of the parent, the consent of the latter to such payment will be presumed.⁴

If the parent has *emancipated* the child, the latter is entitled to his wages, and can recover them for his own use.⁵

At common law the child owed no *legal* duties to the parent. In some States the child is, by statute, bound to *support* the parent under certain circumstances.

C. GUARDIAN AND WARD.

There are two kinds of guardianship.

(a). *Guardianship by the common law.*

(b). *Guardianship by statute.*

Guardianship by the common law was of three kinds :

1. Guardianship by *nature*, which belonged to the father, and on his death to the mother, lasted till the child reached the age of twenty-one, and applied only to the person.

Strictly this form of guardianship extended only to the *heir apparent*.

2. Guardianship by *nurture*, belonging first to father, then to mother, extending only to the age of fourteen.

¹ Schouler Dom. Rel. § 263.

² 1 Bl. Comm. 450.

³ 1 Bl. Comm. 453 ; Schouler Dom. Rel. § 252, and cases cited.

⁴ Campbell v. Cooper, 34 N. H. 49 ; Armstrong v. McDonald, 10 Barb. 300 ; Atkins v. Sherbino, 58 Vt. 248.

⁵ See Schouler Dom. Rel. § 263, and cases cited.

Strictly this form of guardianship applied only to the *younger* children who were not heirs apparent.

3. Guardianship in *socage*, which applied only to lands acquired by the infant by *descent*, which guardianship was given to the next of kin, who could not possibly *inherit* from the infant—*i. e.*, the uncle on the mother's side, when the property descended to the infant from the father.

This guardianship lasted to the age of fourteen, when the infant had the right of choosing a guardian.¹

Guardianship by statute is of two kinds:

1. When in accordance with the provisions of a statute a guardian is appointed by the court.

2. Testamentary guardianship, when by testament a parent appoints a guardian for a child, as he was permitted to do by the statute of 12 Charles II. (1660), and as he may now do by statute in this country.

The common law guardianships are now practically obsolete.

The duties of a guardian to the ward are those of parent to child, and in addition he has control of the infant's *property* and is held rigidly to account for his management thereof.²

The general rule is that the guardian is held to absolute good faith in all his dealings with his ward, and that in his treatment of the ward's property he shall exercise all the care and circumspection of a prudent man in the management of his own concerns.³ He is permitted to make no profit from the estate of the ward, though the courts allow a reasonable recompense for his services out of the estate. He is not permitted to speculate with the funds of the ward, even in good faith and for the benefit of the ward's estate, and is personally liable, together with his bondsmen, for any

¹ See 2 Kent Comm. 220-222.

² See Schouler Dom. Rel. § 320.

³ Bispham Eq. § 234 ; Schouler Dom. Rel. § 345.

loss arising from such speculation.¹ The guardian's accounts are regulated by the statutes of the different States.

When an infant is sued, a guardian *ad litem* is appointed by the court, generally the infant's father, or the statutory guardian.

When an infant brings suit, it is brought in the name of the *next friend* (prochien ami), who is generally either a parent or guardian.

¹ 2 Kent Comm. 329 *et seq.* ; 2 Comyns 230.

CHAPTER III.

THE FEUDAL SYSTEM—ENGLISH TENURES.

THE Feudal system was developed on the continent of Europe, in the centuries succeeding the downfall of the Western Roman Empire, by the Celtic and Teutonic tribes, whose kingdoms were built upon the ruins of that empire. Its essential feature, from which its chief peculiarities sprang, was the holding of land by one person, called the *tenant*, from another, called the *lord*.

A feudal chief, upon conquering the territory of a hostile tribe, distributed the land among his followers, to be held on various conditions. Originally these lands were held at the *will* of the lord, and the grant could be revoked at his pleasure. Then in time the estates came to be held for the *life* of the tenant, upon his conforming to the conditions of the grant, and finally they became *hereditary*. The ceremony by which a tenant became possessed of an estate was called *investiture*, and when this occurred the tenant took the oath of *fealty* or profession of faith to the lord, and also did *homage*, by which he professed that he became the man—*i. e.*, the follower—of his lord. Fealty and homage were the two prerequisites to a tenant's entering an estate of a lord.¹

The system was introduced into England at the time of the Conquest by William, A.D. 1066.

Under this system all property other than personal was held of some superior on condition of rendering

¹ See 1 Guizot His. of Civ. 63 *et seq.*; Hallam's Middle Ages.

certain services. The thing thus held was called a *tenement* or *feud*; the manner of holding, a *tenure*; the person who held, a *tenant* or vassal. The king was called the lord *paramount*; those who held immediately of the king were called tenants *in capite*; those who held of a superior and were also themselves lords of inferiors were called *mesne* or middle lords; while the lowest tenant, who had no one holding of him, was called the tenant *paravail*.

Before the introduction of the feudal system lands held of no superior were called *allodial*, and this is the form which ownership of land practically takes in the United States.¹

Under the feudal system there grew up in England four principal forms of tenure, distinguished by their character in respect to *quantity* and *quality* of the service due from the tenant to the lord.²

I. Knight service, in which the service was *free*,—*i. e.*, such as was becoming a free man,—and *uncertain*.

This tenure prevailed most extensively until it was abolished by the statute of 12 Charles II. (1660)

There were seven incidents, or duties due from the tenant to the lord, connected with knight service.³

1. **Aids**, which were principally three:

A. To ransom the lord's person when captured.

B. To furnish money for knighting his eldest son.

C. To furnish money for a marriage portion for his eldest daughter.

2. **Relief**, a certain amount which the heir was compelled to pay the lord before entering on his inheritance.

3. **Primer seisin**, a kind of relief due from the heirs of tenants *in capite*, consisting of one year's value of the estate if entered upon immediately, and of six

¹ 3 Kent Comm. 513.

² 2 Bl. Comm. 60.

³ 2 Bl. Comm. 62; 3 Kent Comm. 504.

months' value if the lands were in *reversion*, expectant upon a life estate.

4. **Wardship**, or right of having the custody of the person and lands of the heir without rendering an account for the profits, if the heir, being a male, was under twenty-one, or, being a female, under fourteen. In the latter case the guardianship extended to the age of sixteen.

5. **Marriage**, or the right of giving an infant ward in marriage, and if he or she declined the proffered match, of deducting from the ward's estate the amount which the suitor offered the lord for giving the ward in marriage.

In case of elopement and marriage the ward forfeited to the lord double the value of the marriage, as assessed by a jury.

6. **Fines**, or the right to exact from the tenant a certain sum for permission to alienate his feud.

The lord could not alienate his seignory without consent of the vassal, and this consent was called *attornment*.

By *magna charta* and the statute *quia emptores*, 18 Edw. I. (1292), tenants were able to alienate the whole of their estate, to be holden of the same lord from whom they themselves held it.

7. **Escheat**, by which, on the extinction of inheritable blood on the part of the vassal, the estate escheated or reverted to the lord.

Tenure by *grand sergeanty* was a species of knight service by which the tenant was bound, instead of rendering *general* military service, to do some *special* act, as carrying the banner or sword of his lord.

II. **Free and Common Socage**, in which the service was *free*, but *certain*. In the certainty of the service lay its superiority over knight service. Free and common socage includes tenure by petit sergeanty, gavelkind, and borough English.

In *petit sergeanty* the service consisted in rendering to the lord annually some small implement of war.

Gavelkind prevailed most extensively in the county of Kent, and its four marked peculiarities show it to be a tenure existing prior to the conquest.¹

1. Lands held in gavelkind descended to *all the sons* alike.

2. Lands could be *devised* prior to the Statute of Wills.

3. The holder could *alienate* by feoffment *at* the age of *fifteen*.

4. The estate did not *escheat* in case of *attainder* for treason.

Borough English was free and common socage as existing in certain boroughs and towns. Its distinguishing feature was that the land so held descended to the *youngest* son.²

III. **Pure villenage**, in which the service was *base* and *uncertain*.

Copyhold estates developed from this form of tenure.³

In pure villenage the tenants were barely tenants at will, holding merely by the sufferance of the lord, who was in many cases their owner. In process of time, as son succeeded father, the right of the tenants strengthened and the estates became in some cases estates for life, and in others estates of inheritance. They were still regarded as estates held at the will of the lord, but that will was not the arbitrary caprice of any individual lord, but it was the will of the lord as determined by the immemorial custom of the manor,—a *manor* being a large estate held by a powerful lord, some of whose land was held in knight service, other in socage, etc.

This custom of the manor was determined by the

¹ 2 Bl. Comm. 84.

² 2 Bl. Comm. 83.

³ Id. 90 *et seq.*

copy of court roll, kept in the court of the manor in which the land held in copyhold lay. If this record showed that heir had succeeded ancestor immemorially, this succession was presumed to be the will of the lord, and the estate was thus practically one of inheritance.¹

The incidents of the copyhold tenure were :

1. *Fealty*.
2. *Services*.
3. *Relief*.
4. *Escheat*.

5. *Heriots*, or the right which the lord had, on the death of his tenant, to the tenant's best beast or other personal property.

IV. **Privileged villenage**, in which the services were *base* but *certain*, out of which grew the tenure in *Ancient Demesne*.²

This applied to certain lands which were actually in the hands of the crown in the time of William the Conqueror, or Edward the Confessor, and which were granted to be held on condition of services which, though *base*, were *certain*.

V. A fifth form of tenure also existed, *frankalmoign*, under which religious corporations held lands of the donor to them and their successors forever.³

The services of this tenure were not strictly defined, but were ordinarily to pray for the soul of the deceased and others of like nature.

By the statute of 12 Charles II. (1660) all forms of tenure were changed to FREE AND COMMON SOCAGE, with the exception of estates held by *copyhold*, *frankalmoign*, and *grand sergeanty*.⁴

¹ 2 Bl. Comm. 98.

² Id. 98.

³ 2 Bl. Comm. 101.

⁴ Id. 77.

CHAPTER IV.

REAL PROPERTY.

Property is of *three* kinds,—REAL, PERSONAL, and MIXED.

Real property is anything of a *fixed, immovable*, and *permanent* nature. It is divided into three classes: lands, tenements, and hereditaments.¹

I. Land comprehends all things of a permanent, immovable, and *substantial* nature. It has an indefinite extent upward and downward from the surface of the earth. It also includes all things attached permanently to the soil.² In conveying land covered by water, it should be described as such. A grant of a body of water conveys a right of fishery only.

The word land is construed *broadly*, while other words sometimes used in conveying land, as messuage, toft, etc., are construed *strictly*.³

II. Tenement is a *broader* term than land, and includes anything which can be held by any species of *tenure*. It applies to many incorporeal hereditaments, as advowsons, ways.

III. Hereditament is a broader term than either land or tenement, and includes anything which may be *inherited*, such as heirlooms or title-deeds.⁴

Hereditaments are of two kinds—*corporeal* and *incorporeal*. The term corporeal hereditaments is nearly synonymous with land.⁵

¹ 2 Bl. Comm. 14; 3 Kent Comm. 401.

² Co. Litt. 4a:

³ 2 Bl. Comm. 15 *et seq.*; 3 Kent 401 *et seq.*; Tiedeman Real Prop. § 2.

⁴ 2 Bl. Comm. 17; Tiedeman Real Prop. § 11.

⁵ 2 Bl. Comm. 17; 3 Kent Comm. 401.

Incorporeal hereditaments are rights issuing out of a *thing corporate*, whether real or personal, or concerning or exercisable within the same. They are of ten kinds.¹

1. **Advowsons**, or the right of filling a vacancy in some church or ecclesiastical benefice.

2. **Tithes**, or the right of exacting from tenants a tenth of the increase arising from lands, the stock upon lands, and from their own personal labor.

3. **Common**, or the profit which one man has in the lands of another. The four ordinary commons were:

(a). *Pasturage*, or the right of feeding one's beasts on another's land. This was of four kinds: *appendant*, when the tenants of a lord pastured their cattle on land belonging to their lord; *appurtenant*, when the tenants pastured their cattle on the land of a lord other than their own; *because of vicinage*, when the inhabitants of two villages mutually intercommoned through ignorance of the true boundary; *in gross*, which was a right belonging to some person and his heirs, and involving no ownership of land by such person.

(b). *Piscary*, or the right of fishing in water belonging to another.

(c). *Turbary*, or the right of digging turf from the land of another.

(d). *Estovers*, or the right of taking wood used for fuel, the repair of buildings, the implements of husbandry, or fences, from land belonging to another.²

4. **Ways**, or the right of going over another man's land.

5. **Offices**, or the right to exercise some public or private employment, such as the office of keeping the crown jewels. This is an instance of an incorporeal hereditament issuing out of personal property.

¹ 2 Bl. Comm. 19 *et seq.*

² See *Livingston v. Ten Broek*, 16 Johns. 14.

6. **Dignities**, or the right to use some title of nobility.

7. **Franchises**, or rights granted by the supreme power of the State to a person or persons, which could not be claimed as a matter of right.

8. **Corodies**, or the right to receive allotments of provisions for one's maintenance. When a definite sum of money was substituted the term pension was used.

9. **Annuities**, or a yearly sum granted by one to another, and chargeable only on the *person* of the grantor. This does not mean that in event of non-payment the annuitant cannot sue and attach the real property of the grantor, but simply that he cannot look to any particular piece of land to satisfy his claim, as can be done in the case of

10. **Rents**, which are definite profits issuing *yearly* out of lands and tenements. At common law there were three common forms of rent :

(a). *Rent service*, which had some corporal service incident to it, such as ploughing the lord's land. In this rent the landlord, in case of non-payment, had the right of *distress*—i. e., of entering on the land and taking any personal property which he could find for the satisfaction of his claim—no special clause reserving this right being needed in the lease.

(b). *Rent charge*, where the owner of the rent had no future interest or reversion in the land, as where A conveys to B in fee simple, reserving to himself and his heirs a certain rent payable out of the lands so conveyed. This is called a rent charge because in the deed creating it there is a clause giving the right of distress.

(c). *Rent seck* is a rent reserved by deed, *without* any clause of distress.

EASEMENTS.

Most of the incorporeal hereditaments are obsolete. In modern law easements correspond to incorporeal hereditaments in a general way. An easement is the right by which the owner of one tenement, called the *dominant* tenement, can compel the owner of another, called the *servient* tenement, to permit something to be done, or to refrain from doing something, which, as owner of his tenement, he would otherwise have been entitled to restrain or to do.¹ It differs from a common, which is sometimes called a *profit a prendre*, in that the latter always involves the taking of some material thing from the land of another.²

An easement may be created in three ways: (a). By *grant*. (b). By *prescription*, which always implies a grant. (c). By *necessity*, as when A conveys to B land entirely surrounded by other land of A. Here B has a right of way over the land of A.³

A **license** is an authority to do an act or a series of acts upon another's land, without possessing any *estate* therein.⁴

An easement differs from a license in *three* particulars:

(a). An easement is an *interest* in land; a license creates no interest.

(b). An easement *cannot*, therefore, *be created by parol*, as coming within the statute of frauds; a license can.

(c). An easement is *irrevocable*, but a license can be revoked by the licensor when its revocation would do no injury to the licensee, the lack of consideration being the ground of the right of revocation.⁵

¹ 2 Bl. Comm. 36n. (Cooley) and cases cited. See Bouvier, Law Dict., sub. Easements, and cases cited.

² 2 Wash. R. P., Bk. II. *26.

³ Wash. Easem. §§ 3, 4; 3 Kent Comm. 419 (note 13th ed.).

⁴ 1 Wash. R. P. *398; 3 Kent Comm. 452.

⁵ Wash. Easem. *5.

The following are the most important easements: *the right of way, light and air, water, lateral support, and party walls.*¹

1. There are two kinds of ways, *public* and *private*. A public way may be established in two ways:

(a). By *dedication* by the owner, followed by acceptance by the public through the acts of the proper authorities. (b). By an *appropriation* of the land for the public use by the right of *eminent domain*.²

As a general rule, the owner of land bounded on a public way has a fee *to the centre of the street*, subject to the public's easement of a right of passage over the way.³

A *private* way is either a right *in gross*—*i. e.*, a personal right—or it is *appurtenant* to an estate and passes with the conveyance of the estate.⁴

A right of way does not of itself involve the right to have the way kept in repair, and trespass on other land of the owner of the servient estate when the way is out of repair is permissible only when there is a right on the part of the owner of the dominant estate to have the way kept in repair.⁵

2. The easements of *light and air* are the rights to enjoy light and air coming laterally across the land of an adjacent owner, without interference on his part by the erection of buildings, etc. These easements are not generally recognized in this country, though they may be acquired by express grant.⁶

3. When land is bounded on a non-navigable stream, the title of the owner, unless expressly limited otherwise, extends to the *middle of the stream*, and consequently he has an easement in the water—*i. e.*, a right

¹ 2 Wash. R. P., Book II. *25. ² 2 Bl. Comm. 35 note (Cooley).

³ 3 Wash. R. P. *635; *Gardiner v. Tisdale*, 2 Wis. 153.

⁴ *Washburn Easm.* *197 *et seq.*, *564.

⁵ 2 Wash. R. P., Bk. II. *62.

to use the water in any way which does not interfere with the *rights* of riparian owners *lower down*. Dams may be built, provided they cause no permanent diminution in the volume of the stream. The water may be turned aside for manufacturing purposes, provided it be returned to the channel of the stream in such a condition and in such an amount as not to affect the rights of other riparian owners.¹

No right of action arises from any change in *subterranean* watercourses affecting springs or wells on one man's land and caused by excavations on the land of another.

One man has no right by the artificial arrangement of the surface of the soil to cause surface water to flow on the land of another, but there is no action for any damage arising from the flow of such surface water according to the natural configuration of the soil.²

4. The easement of *support* is the right to the natural support of one's *land* by the adjacent land of another. There is no easement for the support of buildings, though as a general rule such an easement can be acquired by prescription.³

5. In a *party wall* the rule in regard to ownership is that each party owns in fee to the middle of the wall, with an easement for support in the other half, when the wall stands partly on the land of each. If a party wall needs repair, the owner repairing can recover a proportionate part of the expense from his neighbor, upon showing that there was need of repair. If one house has been supported by beams resting in the house of another, an easement for the support of the beams may be acquired by prescription.⁴

¹ 3 Kent Comm. 439 *et seq.*; 2 Wash. R. P., Bk II. *64.

² 2 Wash. R. P., Bk. II. *69, and cases cited.

³ Id. *74, *77.

⁴ Id. *48.

CHAPTER V.

FREEHOLDS OF INHERITANCE.

THE word ESTATE denotes an *interest* in lands, tenements, or hereditaments.¹

A freehold is an estate of inheritance, or for life. It is also defined as an estate requiring *livery of seisin* for its creation.² Seisin, though often equivalent to possession, is not synonymous with it, but signifies the possession or right of possession, immediate or expectant, of a *freeholder*.³

Estates of inheritance are divided into four classes—estates in *fee simple*, *base* or *qualified* fees, *conditional* fees, and fees *tail*.

1. An estate in fee simple is the *largest* estate that can exist in lands, tenements, or hereditaments. It is an estate conveyed to a man and his heirs forever. At common law the word *heirs* was necessary to create an estate in fee simple by *deed*, and no other term could be used in its stead. This is still the rule in many States. There were, however, five exceptions to the rule: (1) in *devises*; (2) in *grants to corporations* where the word *successors* was used instead of heirs; (3) in *finés* and *common recoveries*; (4) in *writs of nobility*; (5) in *grants to the king*.⁴

2. A *base* or *qualified* fee is one which has some qualification annexed thereto, and which must terminate

¹ 2 Bl. Comm. 103; 1 Preston on Estates, 20.

² 4 Kent Comm. 24; 2 Bl. Comm. 104.

³ This definition is submitted as accurate, though, so far as the writer knows, it has never been given in precisely this form.

⁴ 2 Bl. Comm, 108.

whenever the qualification terminates—as a grant to A and his heirs, tenants of the manor of Dale.

3. A *conditional fee* was a fee restrained to some particular heirs, as to the heirs of a man's body. It was so called because of the implied condition that if the grantee died without the specified heirs, the estate should revert to the grantor. Upon the birth of the specified issue, the courts, eager to encourage freedom in the alienation of estates, construed the estate as being an absolute fee simple in three respects: (1) for the purpose of *alienation*, so as to bar heirs and reversioner; (2) for the purpose of *forfeiture* for treason; (3) for the purpose of *charging* the estate with incumbrances.

As a result, upon the birth of issue, the grantee alienated the estate to some person who at once reconveyed it to the grantee, thereby vesting in him an estate in fee simple and defeating the intention of the grantor.¹

Through the influence of the nobility, who wished, by tying up estates in their own families, to prevent free alienation, the statute *de donis conditionalibus* was passed (13 Edw. I.), which, operating on conditional fees, produced

4. **Estates tail.** This statute enacted that thenceforth the will of the donor be observed in conditional fees, and that the *tenements* given to a man and the heirs of his body should in any event go to the issue, if there *were* any; otherwise, that they should revert to the donor. This statute operated for two hundred years, until in the twelfth year of Edward IV., in *Taltarum's case*,² a *common recovery* was held to be a bar to an estate tail.

Estates tail are of no practical consequence in this

¹ 2 Bl. Comm. 110 *et seq.*; 4 Kent Comm. 11.

² Year Book 12 Edw. IV. 14, 19; see 4 Kent Comm. 13.

country, where, as a rule, they can be barred by a conveyance in fee.¹

In the creation of an estate tail the word heirs was necessary, and also the expression *of the body*, or some other words of procreation. Estates tail are of two kinds: (1). *General*, as to a man and the heirs of his body. (2). *Special*, as to a man and some *particular* heirs of his body, as to those from his wife A begotten.

Estates tail general are of two kinds: (1). *Male*, as to a man and the heirs male of his body; (2). *Female*, as to a man and the heirs female of his body.

Estates tail special are of two kinds: (1). *Male*, as to a man and the heirs male of his body by his wife A begotten; (2). *Female*, as to a man and the heirs female of his body by his wife A begotten.²

Frankmarriage was a species of estate tail, where one man conveyed tenements to another upon the latter's marriage with the former's daughter or cousin.³ The word frankmarriage was the operative word in the conveyance, and created in the grantee an estate tail special, *without words of procreation*.

There are *four incidents* to estates tail: (1) The tenant in tail could commit *waste*; (2) *curtesy*; (3) *dower*; (4) they could be *barred* by *fin*es, *common recoveries*, and by a *lineal warranty* descending with assets to heirs.

¹ See 4 Kent Comm. 14; 1 Wash. R. P. *84, note (5th ed.).

² 2 Bl. Comm. 113 *et seq.*

³ Id. 115.

CHAPTER VI.

FREEHOLDS NOT OF INHERITANCE.

Freehold estates not of inheritance are of two classes—*conventional*, or those created by act of the parties; *legal*, or those created by law.¹

Conventional estates are divided into two classes—those to be held by the lessee during *his own life*, and those to be held by the lessee during *the life of another*. In the second class, the lessee was called the *tenant pur autre vie*, and the person during whose life the estate was to be held the *cestui que vie*. If the tenant died before the *cestui que vie*, the estate could not go to his heirs, not being an estate of inheritance; it could not go to the personal representatives, as it was not a chattel interest. Therefore, by the ancient common law the first taker had the right to hold the estate during the remainder of the life of the *cestui que vie*. This was the only instance at common law where a title to real property could be acquired by *occupancy*.

If the grant was to a man and *his heirs*, to hold during the life of another, then, in event of the tenant's dying before the *cestui que vie*, the heirs held as *special occupants*.

The right of occupancy was destroyed by statute 29 Charles II., which enacted that where there was no special occupant, the tenant *per autre vie* could devise the estate; otherwise that it should go to his personal representatives.²

¹ 2 Bl. Comm. 119; 1 Wash. R. P., p. 120 (5th ed.).

² 2 Bl. Comm. 257.

There are three incidents pertaining to all life estates, of whatever nature: 1. *Estovers*, or the right of the tenant to cut and use wood for the purposes stated on page 23.¹

2. *Emblements*, which are the *annual* crops brought to maturity by the labor of the tenant. Grass, fruit, etc., are not emblements. *When the termination of the tenancy could not have been foreseen, and was not occasioned by his own act*, the tenant or his personal representatives are entitled to emblements: as, in an estate to A for life, if A dies before the emblements are gathered, his personal representatives would be entitled to emblements. But in an estate to A to hold so long as she remains unmarried, the marriage of A would destroy her right to emblements.

3. The right of *subletting*, unless there is a provision in the lease to the contrary.²

Legal estates of freehold are divided into three classes, *tenancy in tail after possibility of issue extinct*, *curtesy*, and *dower*.

1. Tenancy in tail after possibility of issue extinct arose from an estate tail special, where the person from whose body the issue was to come had died, leaving no issue; or having left issue, the issue had become extinct. The surviving tenant, under these circumstances, had a life estate, with the right of committing *waste*, a right not enjoyed by the ordinary tenant for life.³

2. **Curtesy** arises when a man marries a woman seized of an estate of inheritance, and she dies, having had issue capable of inheriting the estate. The hus-

¹ Estovers, as used in this connection, should not be confounded with the common of Estovers, which, strictly, is a right exercised in lands other than those occupied by the tenant.

² 2 Bl. Comm. 122 *et seq.*; 4 Kent Comm. 73.

³ 2 Bl. Comm. 124.

band then has an *estate for life* in these estates of the wife.

There are four requisites essential to curtesy. (1). *Legal marriage*. (2). *Actual* seisin of the wife. (3). *Birth of issue capable of inheriting*. (4). *Death* of the wife.¹

Seisin is of two kinds—*actual*, or seisin in *fact*, and *constructive*, or seisin in *law*.² In connection with curtesy, seisin means the actual possession or enjoyment of the estate of inheritance by the wife. There was no curtesy in a remainder or reversion. As the husband had it in his power to reduce his wife's constructive seisin to actual seisin, he had no curtesy in her estates if he failed to do so.³

Upon marriage and the birth of issue capable of inheriting, the husband became tenant by the *curtesy initiate*, and this interest at common law could be sold under execution.⁴

The husband had curtesy in the equitable estates of the wife, to whose rents and profits she was entitled,⁵ though there was no curtesy in equitable estates in which the wife was the trustee. Curtesy is regulated by the statutes of the different States, the common law having been largely modified in most instances.

3. **Dower** arises when a husband is seised, during marriage, of an estate of inheritance and dies. Here the wife has a life estate in *one-third* of such lands and tenements.

There are three requisites of dower. (1). *Legal mar-*

¹ 2 Bl. Comm. 126 *et seq.*; 4 Kent Comm. 27 *et seq.*; 1 Wash. R. P. *128 *et seq.*

² Constructive seisin is substantially merely a right to gain actual seisin.

³ 2 Bl. Comm. 127-130.

⁴ Wickes *v.* Clarke, 8 Paige 172; Canby's Lessee *v.* Porter, 12 Ohio 80. This principle is changed by statute in some States.

⁵ 1 Wash. R. P. *130.

riage. (2). *Seisin*, either actual or constructive, of the husband. (3). *Death* of the husband.

Actual seisin is not essential, since the wife has no power to convert the husband's constructive seisin into actual seisin.¹

At common law dower could be barred in three ways:

(1). By *elopement and adultery*. (2). Divorce *a vinculo*. (3). *F jointure*, which was an estate settled upon a woman *in lieu of dower*. There were four essentials to a good jointure:

(1). *It must take effect immediately on the death of the husband*. (2). *It must be for the wife's own life*, not for the life of another, nor for a term of years. (3). *It must be held by her in her own right*, and not in trust for her. (4). *It must be in lieu of her whole dower*.²

A jointure made *before* marriage was binding on the wife; if made *after* marriage, she had her election between the jointure and her common-law dower.³

By the widow's *quarantine* was meant the right of the widow to remain in and occupy the house of her deceased husband for the period of forty days.

In case an *insufficient* dower was assigned to the widow, she could enforce her claim to the rest by the *writ of right of dower*.

If no dower were assigned, she could enforce her claim by a *writ of dower*.⁴

The subject of dower is regulated by statute in the various States, and these statutes, as well as those relating to curtesy, should be carefully studied by the student, in preparation for his examination.

¹ 2 Bl. Comm. 129 *et seq.*; 4 Kent Comm. 35 *et seq.*; 1 Wash. R. P. *169, par. 1-5.

² 2 Bl. Comm. 136.

³ 1 Wash. R. P. *266.

⁴ 3 Bl. Comm. 182, 183.

CHAPTER VII.

ESTATES LESS THAN FREEHOLD.

Estates less than freehold are of three kinds—estates for *years*, estates at *will*, and estates at *sufferance*.

I. An estate for years is an estate created by a contract for the possession of lands or tenements for some *determinate* period.¹

It is created by a *lease*. The lease itself creates no estate, but gives the lessee a bare right of entry, which is called the *interesse termini*.²

The word *term* indicates the interest, or the amount of estate which the lessee has in the property. The word *time* indicates how long the *term* may continue. Thus, if an estate is granted to A for six years, and, at the end of the *term*, to B for ten years, in case A surrenders or forfeits his interest B's estate vests immediately, as the *term* has expired; while if the same grant had been made with remainder to B at the expiration of the *time*, B's estate would not vest till the end of six years, whatever might have become of the estate of A in the meantime.³

The incidents of an estate for years are :

1. *Estovers*.
2. The *right of subletting*, unless there is a covenant to the contrary in the lease.
3. *Emblements*, under certain circumstances, as when the estate for years is brought unexpectedly to an end

¹ 2 Bl. Comm. 139. See Tied. R. P. § 172.

² Tied. R. P. § 174.

³ 2 Bl. Comm. 144. See 1 Wash. R. P. *292, par. 4.

by no fault of the tenant's. Thus if A leases for a term of years from B, a tenant for life, and the latter dies before the lease for years expires, A is entitled to emblements.¹

In case the property leased consists of buildings, unless there are covenants to that effect, the tenant cannot compel the landlord to keep them in repair. Though they should be destroyed by fire immediately after the making of the lease, the landlord is not obliged to restore them, nor is the tenant relieved from paying rent. Even equity gives no relief in this case.²

So long as the tenant remains in possession, he can under no circumstances dispute his landlord's title.³

II. **Estates at will** are such as are held at the will of landlord and tenant, and may be determined at the will of either party.⁴ No arbitrary termination of the estate was allowed to operate to the injury of either party. The tenant was entitled to emblements if the estate was determined by the landlord.⁵ *The law does not favor estates at will*, and at common law they were generally construed as estates *from year to year*, as the rent was usually paid annually.⁶ The general rule now is that either party must give the other a notice equal in length to the rent period, before he can terminate the estate, and that this notice shall *take effect at the beginning of a rent period*.⁷ If A is tenant of B and pays his rent quarterly, and the rent is due the first of October, a notice to quit from B given on the first of August would operate from the first of the following October.

III. **An estate at sufferance** occurs when a tenant

¹ 2 Bl. Comm. 144; Tied. R. P. § 182.

² 2 Bl. Comm. Id. (Cooley's ed. note 9); Tied. R. P. § 189.

³ Tied. R. P. § 193, and cases cited.

⁴ Tied. R. P. § 212; 1 Wash. R. P. *370. See 2 Bl. Comm. 145.

⁵ 4 Kent Comm. 111; 2 Bl. Comm. 146.

⁶ Id. 112; Id. 147, and note.

⁷ Tied. R. P. § 218.

comes into possession of land by a lawful title, and remains in possession when the title has expired, and without any lawful title.¹ Such a tenant differs from a trespasser only in that the landlord must make entry and proceed against him by the action of ejectment.²

¹ 4 Kent Comm. 116.

² 2 Bl. Comm. 150. See *Darrell v. Johnson*, 17 Pick. 266.

CHAPTER VIII.

ESTATES UPON CONDITION.

An estate upon condition is one which may be created, enlarged, or defeated by the happening or not happening of some event.¹

Conditions are divided into

1. Conditions in *fact*, or express conditions, being such as are contained in the instrument creating the estate, as in the case of a mortgage.

2. Conditions in *law*, or implied conditions, which need not be expressed in the deed, but which exist by the presumption of law, as that a tenant for life shall not commit waste; as, in a grant to a corporation, that the corporation shall live up to its object and design.²

Conditions are also divided into

1. Conditions *precedent*, or those which must be fulfilled before the estate can vest or be enlarged; as, an estate to A for life on his marriage with B: an estate to A for ten years; if he marries B, then for life.

2. Conditions *subsequent*, or those which cause the defeating of the estate; as an estate to A to hold so long as he remains unmarried.³

Express conditions are *void*

A. If they are *impossible*, or become so by the act of God; as an estate to A for life if he shall go a thousand miles in an hour.

B. If they are *repugnant to the law*; as an estate to A for life if he kills a certain person.

¹ 4 Kent Comm. 121; 2 Bl. Comm. 151.

² 2 Id. *et seq.*

³ 4 Kent Comm. 124; Tied. R. P. § 271.

C. If they are *repugnant to the nature of the estate*; as an estate to A for life, provided he alienates a portion of it in fee.¹

If the void condition is a condition precedent, the estate *never vests*; if a condition subsequent, it is *inoperative* and cannot defeat the estate.

The distinctions between an *estate upon condition*, an *estate with limitation*, and a *conditional limitation* are these:

An estate upon condition is one which is *not absolutely defeated* by the happening of the condition, but which requires *entry* on the part of the grantor or his heirs in order to completely divest the grantee of the estate; as, an estate to A for life, upon condition that he remain unmarried. Here, upon the marriage of A, entry on the part of the grantor or his heirs would be necessary to defeat A's life estate.

An estate with limitation is one which is *absolutely defeated* by the happening of the condition; as, an estate to A to be held only as long as he remains unmarried. Here the marriage of A entirely divests him of the estate, no entry on the part of the grantor or his heirs being needed.

A conditional limitation is an estate upon condition with a limitation over to some other party upon the happening of the condition; as, an estate to A for life upon condition that he remain unmarried, but if he marry, then to B and his heirs. Here, upon A's marriage, his estate would be defeated and the title would immediately vest in B and his heirs. *The condition is construed as a limitation*, out of regard for B, whose estate might otherwise be defeated through the failure of the grantor or his heirs to enter upon A's marriage.²

¹ 2 Bl. Comm. 156, 157; Tied. R. P. §§ 274, 275.

² Tied. R. P. § 281; 4 Kent Comm. 126. See also 2 Bl. Comm. 155.

Among the most important estates upon condition are those created by *mortgage*. In this connection may be mentioned the *vivum vadium*, which was the grant of an estate from A to B, to be held by the latter until the rents and profits should pay to B a loan from the latter to the former. In this case the pledge was a *living one*; that is, the title to the land could not be completely lost by A.

A *Welsh mortgage* differed from a *vivum vadium* only that in the case of the former the rents and profits were applied solely to the payment of the interest, while in the latter they were applied both to principal and interest.¹ Both the *vivum vadium* and the *Welsh mortgage* are obsolete.

A mortgage proper (*vadium mortuum*) is a conveyance absolute in form, from A to B, upon condition that if A shall at a time certain or upon demand repay to B a sum of money, the conveyance shall be void.² At common law, if the mortgagor failed to make the payment precisely at the appointed time, the estate conveyed in mortgage became absolute in the mortgagee. Afterwards equity interfered and gave to the mortgagor a reasonable time in which to redeem the estate, upon condition broken, this right being called the mortgagor's *equity of redemption*.³

There are two parts to a mortgage, the *conveyance*, and the *defeasance*, which contains the conditions, upon the fulfillment of which the conveyance becomes void. They are commonly contained in the same instrument, though they may be made separately.⁴ A deed *absolute in form* may be shown to be a *mortgage*, if that was the real intention of the parties.⁵

¹ 2 Bl. Comm. 157; 4 Kent Comm. 137; 2 Wash. R. P. *476

² 2 Wash. R. P. *475; R. and L. Law Dict., sub. Mortgage.

³ 2 Bl. Comm. 158; Tied. R. P. § 299.

⁴ 4 Kent Comm. 141.

⁵ See *Emerson v. Atwater*, 7 Mich. 12; Tied. R. P. § 307.

At common law it was held that the fee, together with the general property, was in the mortgagee, there being merely a right of redemption in the mortgagor, and this is the doctrine in some States, while in others it is held that the fee is still in the mortgagor, the mortgagee having only a lien on the mortgaged property.¹

The mortgagee's interest is regarded as a *chattel* interest, and goes to his personal representatives, instead of to his heirs-at-law.²

At common law the mortgagee could take possession of the mortgaged premises at any time, and apply the rents and profits to the liquidation of his claim, unless there was a stipulation that the mortgagor should remain in possession until condition broken. Mortgages generally contain this provision, and if they do not it is the universal practice for the mortgagor to retain possession, founded upon the presumed or tacit consent of the mortgagee.³

Upon default in payment, the mortgagee has the right to *foreclose*—that is, to cut off the mortgagor's interest in the mortgaged premises. The methods of doing this are regulated by statutes, varying in the different States. These statutes should be consulted by students. In general, they may be grouped under the following heads:

a. By *peaceably entering* on the premises and remaining in possession a certain time.⁴ The mortgagor, during this time, can redeem by paying the amount due, and the mortgagee must account for the rents and profits.

b. By bringing a *bill in equity*, asking for a foreclosure by decree of court. Sometimes the court de-

¹ 2 Bl. Comm. 158; 4 Kent Comm. 154. See Tied. R. P. § 301.

² Tied. R. P. § 319.

³ 4 Kent Comm. 155, 165.

⁴ 2 Pingree on Mortgages, § 1576 *et seq.*

crees that unless the mortgagor shall pay the amount due before a certain time, his interest shall be forever foreclosed, and that the estate shall become absolute in the mortgagee. This is called *strict* foreclosure. The more common decree is for a sale of the premises, any balance left after payment of the amount due on the mortgage and the costs to be paid to the mortgagor.¹

c. Many mortgages contain a *power of sale*, authorizing the mortgagee, in default of payment, to sell the mortgaged premises. This proceeding is regulated by statute.²

The mortgagor is not obliged to foreclose if he has any personal remedy against the mortgagee, as a note or a bond; and if foreclosure proceedings fail to satisfy his claim, he can follow any personal remedy he may have.

Tacking was an English doctrine by which, if there were three mortgages on the same property, the third mortgagee could buy the first mortgage and could "tack" his third mortgage to it, compelling the payment of the first and third before the second could be satisfied. It depended on the equitable maxim that *when the equities are equal the law will prevail*. The doctrine does not hold in the United States.³

¹ Tied. R. P. § 358.

² Tied. R. P. § 363.

³ 4 Kent Comm. 176 *et seq.*

CHAPTER IX.

REMAINDERS—EXECUTORY DEVISES—REVERSIONS.

I. A **remainder** is an estate limited to take effect on the termination of some preceding estate. There are three essentials to every good remainder.

1. *It must have a particular estate to support it.* An estate at will is not sufficient for this purpose.

2. *The remainder must pass from the grantor at the time of the creation of the particular estate.* If an estate for life were conveyed to A to-day, and to-morrow a conveyance were made creating a remainder in B, the latter would be void.

3. *The remainder must vest during the existence of the particular estate, or immediately on its termination.* If an estate be given to A for life, remainder to B's oldest son, and B dies before A, leaving no son, the remainder is void; while if B has a son during the life of A, the remainder vests in him and is good.¹

Remainders are of two kinds—vested or executed, and contingent or executory.

A. A vested remainder is one in which the estate is invariably fixed in a determinate person on the termination of the particular estate. It is one in which the remainder-man is certain to enjoy the estate, provided he survives the owner of the particular estate. The test to distinguish between a vested and a contingent remainder is the certainty of the *right* to enjoy which the remainder-man in the first case has, not the cer-

¹ 2 Bl. Comm. 164 *et seq.*

tainty of the *enjoyment*.¹ An estate to A for life, remainder to B and his heirs, is a vested remainder.

B. A contingent remainder is one which is directed to take effect in a dubious or uncertain person, or upon a dubious or uncertain event, as an estate to A for life, remainder to B's unborn son, or an estate to A for life, remainder to B upon his return from Rome.

Every contingent remainder requires an *estate of freehold* to support it, in order that the seisin may vest.²

In an estate to A for twenty years, remainder to B and his heirs, upon A's taking possession the seisin is in B; but in an estate to A for twenty years, remainder to B's unborn son, there is no one in whom the seisin can vest, and consequently the remainder would be void, and only the estate to A would pass by the conveyance.

As a general rule, a contingent remainder *cannot* be limited on a *double possibility* or contingency where there is some legal improbability in the contingencies; as, in an estate to A for life, remainder to B's heirs, no such person as B being in existence.³ *Contingency, etc.*

ILLUSTRATIONS.

An estate to A for life, remainder to such uses as A shall appoint, and in default of appointment, remainder to B, is a *vested remainder* in B.⁴

An estate to A for one hundred years, if B shall live so long, and after B's death to C in fee, is a *vested remainder*. The possibility that B will live one hundred years is so small as not to give a contingent character to the remainder.⁵

¹ 2 Bl. Comm. 168; 4 Kent Comm. 202, 203, 206; Fearn's Cont. Rem. 216.

² 2 Bl. Comm. 171.

³ Id. 170. This rule is obsolete. Tied. R. P. § 417.

⁴ *Cunningham v. Moody*, 1 Ves. 174.

⁵ 4 Kent Comm. 209.

An estate to A, B, and C for life, remainder in fee to the survivor of them, is a *contingent* remainder.¹

A devise of one lot to A in fee and of another to B in fee, and if either dies without issue the survivor to take both, is a *cross contingent* remainder.²

The courts *favor vested remainders*, and where there is doubt will construe remainders as vested.³

Rule in Shelly's case.⁴—When by any gift or conveyance an ancestor takes an estate for life, and by the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs shall be construed as a *word of limitation*, and not of *purchase*.

Under this rule, if an estate were given to A for life, remainder to his heirs, the whole estate would vest in A and he would take an estate in fee simple. In other words, the word heirs has no reference to the heirs as such, but it is regarded as simply defining or limiting the estate which the ancestor is to take. If the ancestor dies intestate and not having alienated the estate, the heirs take by *descent*, and not by *purchase* under the grant to the ancestor. So, if an estate were given to A for life, remainder to B for life, remainder to A's heirs, A would have a life estate with remainder to *himself* in fee, and he could convey his life estate, subject to B's life estate, together with the remainder in fee simple, so as to bar his heirs.⁵ The rule in Shelly's case has been abolished in some States, in others it has partial operation, and in others it retains its full effect.

A perpetuity is an attempt to control the disposition and direction of property for a longer time than is allowed by law as, if an estate were given to A for life,

¹ Id. 207.

² Id. 201.

³ Id. 203.

⁴ 1 Co. 104.

⁵ See 4 Kent Comm. 214; Tied. R. P. § 433 *et seq.*; 2 Wash. R. P. *268 *et seq.*

remainder to B's eldest son C, remainder to C's eldest son, etc. The law permits the owner of property to control its disposition among persons *who are in existence during the life of the first taker, and for twenty-one years after their decease*. That is, *the absolute and uncontrolled interest must vest in some person during that time*, any limitation beyond being void.¹ A grant of property to trustees to hold in trust during the lives of the testator's sons and during the lives of all their sons who should be living at the time of the testator's death, and upon the death of the last to be given to certain persons absolutely, would be good, as not coming within the rule against perpetuities. This subject is regulated by statute in the different States.

There is *one exception* to the rule against perpetuities, namely, in grants of property to trustees *to be held for eleemosynary purposes*²—i. e., for purposes of religion, education, charity, and of relieving the people of burdens which might be imposed by the government by way of taxation. Here the grantor can determine the perpetual disposition of the property.

Merger is the doctrine by which, when a lesser and a greater estate come together in the same person, the lesser is merged or swallowed up in the greater. Thus, in a grant of an estate to A for life, remainder to B and his heirs, if A should purchase the remainder of B, his estate for life would be merged in the fee thus acquired.

The estates must vest in one and the same person by one and the same right, in order to allow of merger. Thus, if a tenant for years should make the remainder-man or reversioner his executor, merger would not take place. Merger did not apply in the case of an estate tail, if the tenant in tail purchased the reversion.³

¹ 4 Kent Comm. 267; Tied. R. P. § 544.

² Bish. Eq. § 133.

³ 2 Bl. Comm. 177.

X
II. An **executory devise** is such a disposition of *lands* by will that thereby no estate vests in them on the death of the deviser, but only on some future contingency.

An executory devise differs from a remainder in three particulars:

1. *It does not require a particular estate to support it.* A conveyance by deed to A, to take effect in one year from its date, would be void. A devise to A, to take effect one year from the testator's death, would be good.

2. *A fee can be limited over a fee by an executory devise; by a remainder it could not.* In estate to A in fee, and if he dies before reaching the age of twenty-one, then to B and his heirs, the limitation over to B would be void by deed; it would be good in a devise.

3. *By an executory devise a remainder can be limited in a chattel interest after a life estate in the same.* A grant of an estate of a thousand years to A, to be held by him for life, remainder to B, would be void by deed, but good as an executory devise. At common law a life estate was regarded as greater than an estate for years, however long, and when the two came together in one person the estate for years was merged in the life estate, and there was nothing on which a remainder could operate. But in wills the strictness of the common law was mitigated in order to carry out the obvious intention of the testator.¹

III. A **reversion** is the *residue* of an estate left in the grantor to commence upon possession after the determination of a particular estate granted by him. It is never created by deed, but arises by construction of law.

The usual incidents of a reversion are *fealty* and *rent*.

¹ 2 Bl. Comm. 172 *et seq.* For discussion of 2, see *Van Horne v. Campbell*, 100 N. Y. 287.

The rent may be granted away, reserving the reversion, and the reversion may be granted away, reserving the rent, by special words; but by a general grant of the reversion the rent passes as an incident thereto.¹

¹ 2 Bl. Comm. 175.

CHAPTER X.

SEVERALTY, JOINT TENANCY, ETC.

With regard to the *number* and *connection* of their owners, estates may be held in four different ways—*severalty*, *joint tenancy*, *coparcenary*, and *tenancy in common*.

I. An estate is held in *severalty* when *one* person is the sole owner thereof.

II. An estate in *joint tenancy* is where lands or tenements are granted to *two or more* persons to hold in fee simple, fee tail, for life, for years, or at will.¹

This estate is always created by act of the *parties*, never by *law*.

Estates in *joint tenancy* always possess four *unities*, namely, *title*, *time*, *interest*, and *possession*,—*i. e.*, the estate must be created by the same title, and at the same time, and each tenant must have an equal interest and a common possession. Joint tenants are seised *per my et per tout*,—*i. e.*, each one is seised of the whole and of each part. They are seised of the *whole* of an undivided part, not of a *part* of an undivided whole, as is the case with tenants in common. Therefore when one joint tenant conveys to another, a *release* would be used, and not a *feoffment*, since no livery of seisin is needful, each tenant being already seised.²

In the case of a grant to a *man and his wife*, they were neither tenants in common nor joint tenants, as they were regarded as one person. They were seised

¹ 2 Bl. Comm. 180.

² 2 Bl. Comm. 180 *et seq.*; Tied. R. P. § 238.

per tout and were called tenants by the *entirety*. In a grant to a man and his wife and a third person, the man and wife took a half, and the third person the other half.¹

The chief incident of joint tenancy was the *right of survivorship* (*jus accrescendi*), by which the whole estate given to the joint tenants finally vested in the last survivor. Thus in a grant to A, B, and C to hold as joint tenants in fee, the whole estate in fee would vest in A if he survived B and C.²

An estate in joint tenancy may be *destroyed* by destroying any of the four unities. At common law there was no right of partition, but this right was given by statute 31 and 32 Henry VIII. (1540-41).³

Suppose an estate were given to A, B, C, and D to hold as joint tenants for life, with remainder in fee to the survivor, and that D alienates his interest to E. Then A, B, and C are joint tenants with regard to each other, and tenants in common with regard to E. C dies, then A and B hold three-fourths of the estate as joint tenants, and E one-fourth as a tenant in common with A and B. B dies, then A holds the three-fourths and E the one-fourth as tenants in common. On the death of D the whole estate in fee would vest in A.

III. Coparcenary is where lands of inheritance descend from an ancestor to two or more persons. By common law, when an ancestor died leaving as his heirs *females*, they all inherited, taking as *coparceners*. By *special custom*, males took as coparceners, as in lands held by *gavelkind*.

Coparcenary differed from joint tenancy in four respects:

1. It was created by *act of law*, while joint tenancy was created by *act of parties*.

¹ 2 Bl. Comm. 182; Tied. R. P. §§ 242, 243.

² Id. 183; Id. § 238.

³ 2 Bl. Comm. 185.

2. The *unity of time* was not necessary. If A, B, and C were coparceners, and A died leaving a daughter D; B, C, and D were still coparceners, though unity of time was absent.

3. There was *no right of survivorship*, since coparceners were seised *per my* and not *per tout*.

4. Coparceners could *compel partition* at common law.¹

Hotchpot was where one coparcener had, prior to the death of the ancestor, received an estate in frankmarriage, and then the ancestor had died, leaving estates in fee simple. The donee in frankmarriage was obliged to put her estate in with the estates in fee simple, in order to share as coparcener in such estates. The rule held only where lands descended in *fee simple*. When they descended in fee tail, the donee in frankmarriage was entitled to her share as though she had received no advancement.²

IV. *Tenancy in common* is where tenants hold by different titles, but have the *unity of possession*. They are seised *per my* and not *per tout*, consequently there is no right of survivorship. Partition could not be compelled at common law, but statutes 31 and 32 Henry VIII., enabled this to be done.³

The ancient common law favored joint tenancy. When the influence of the feudal system weakened, the construction favored tenancy in common. At the present time, *express words* to that effect are needed to create an estate in joint tenancy, such as "to hold as joint tenants and not as tenants in common."⁴

¹ 2 Bl. Comm. 187 *et seq.*

² Id. 190.

³ 2 Bl. Comm. 191; Tied. R. P. § 239.

⁴ 2 Bl. Comm. 193; Tied. R. P. § 240; 1 Wash. R. P. *408.

CHAPTER XI.

TITLE BY DESCENT.

Title is the legal ground upon which a person's estate rests. A perfect title comprises *actual possession, right of possession, right of property*.¹

The right of property is now obsolete.²

At common law these three elements of title might exist in as many different persons. Suppose that A disseises B. A has the naked possession, but both the apparent and the actual right of possession lie in B. A dies, still in possession, and C, his son, remains in possession. This is called a *descent cast*,—*i. e.*, when a disseisor dies and his heir takes possession of the property. Now C has the actual right of possession, though the apparent right of possession is still in B. He can enforce his right only by an action at law, but not by any act of his own. Should B take no action for thirty years, his apparent right of possession would be gone, and he would have the mere *right of property*, C having the possession and the right of possession. Now if C should be disseised by D and the latter's son E should receive the estate by a descent cast, the actual right of possession would be in E, the apparent right of possession in C, and the right of property in B.

In case the disseisor and his heirs remained in possession under a claim of right for sixty years, they gained a perfect title, and the disseisee lost even the right of property.³

The common law in regard to the time required to

¹ 2 Bl. Comm. 195, 196.

² Id. 198, note 3 (Cooley); see Walker's Am. Law, 366.

³ 2 Bl. Comm. 197 *et seq.*

gain a complete title to real property by adverse possession has been changed by statute both in this country and in England, and now by *open, continued, uninterrupted, and adverse possession under a claim of right for twenty years*, an owner's title may be completely barred.¹ Generally, by statute, the twenty years do not begin to run in the case of *infants, married women, insane persons, and persons beyond seas*, until the disability has been removed.² The occupancy by adverse possession need not be by one person, but may be by any number of persons who are *in privity* with each other, as ancestor and heir, grantor and grantee.³

Descent is the title by which a person, on the death of his ancestor, acquires his estate by right of representation as his heir-at-law.

Consanguinity is the relationship existing between persons who are descended from the same common ancestor. Consanguinity is of two kinds:

1. *Lineal*, or the relationship existing between persons one of whom is descended directly from the other, as between father, son, grandson, etc.

2. *Collateral*, or the relationship existing between persons descended, not the one from the other, but from the same ancestor, as between brothers, they being descended from the same parents.

In reckoning lineal relationship, each generation counts a degree, so that the father is related to the son in the first degree, to his grandson in the second, etc.⁴

In computing collateral relationship, two methods have been used:

a. The *common-law method*, in which, starting with the common ancestor, the degrees were reckoned down

¹ See 3 Wash. R. P. *489 *et seq.*; Tied. R. P. § 697 *et seq.*; School District v. Lynch, 33 Comm. 333; Gay v. Mitchell, 35 Ga. 139; Morrison v. Kelley, 22 Ill. 610; School District v. Benson, 31 Me. 384.

² 3 Wash. R. P. *501.

³ Id. *493.

⁴ 2 Bl. Comm. 201 *et seq.*

by generations to the persons whose relationship was to be determined, and the *degree of the more remote* determined the degree of relationship. If they were related in the same degree to the common ancestor, that degree determined the degree of relationship between them. Thus, the degree of relationship of an uncle and a nephew is determined by starting from the common ancestor, who would be the grandfather of the nephew and the father of the uncle, and reckoning down to the nephew, two degrees, and to the uncle, one degree; and the degree of the nephew being the more remote, he would be related to the uncle in the second degree. First cousins would be related in the second degree, each being two degrees removed from the common ancestor, the grandfather.

b. The *method* of reckoning consanguinity *employed in the civil law*, and which has been generally adopted in this country, is to count from one person up to the common ancestor, and then down to the other, the *sum of the degrees* determining the degrees of relationship. Uncle and nephew would be related in the third degree, first cousins in the fourth, etc.¹

An heir apparent is one who would inherit, provided he survives the ancestor, as an eldest son.

An heir presumptive is one who would inherit, provided the ancestor should die *at the present moment*, as a daughter who was an only child.²

There are seven canons of descent at common law. All are now obsolete, with the exception of the fourth, which is still operative with considerable modifications.

1. Inheritances shall lineally descend to the issue of the person who last died actually seised, but shall never lineally ascend. Actual seisin is necessary. Thus, if A

¹ 2 Bl. Comm. *206 and note (Cooley); 4 Kent Comm. 412; 3 Wash. R. P. *406.

² 2 Bl. Comm. 208.

should die leaving two sons, B the elder, C the younger, and B should die, never having been actually seised, C, the younger son, would inherit to the exclusion of B's heirs, as being the heir of A, the person last actually seised.

2. *Male issue shall be preferred to female.* A dies leaving three daughters and one son. The son inherits the whole estate to the exclusion of the daughters.

3. *Where there are two or more males in equal degree, the eldest only shall inherit; where there are two or more female heirs in the same degree, they take as coparceners,* share and share alike.

4. *The lineal descendants of any person deceased shall represent their ancestor,—i. e.,* shall stand in the same place that the person himself would have stood, had he been living.

Suppose an ancestor has three daughters, A, B, and C; A dies leaving three daughters, B dies leaving a son and two daughters, and C dies leaving four daughters. Last of all, the ancestor dies. Then the three daughters of A will each take one-third of one-third of the estate, being regarded as standing in the place of their mother. The son of B would take the whole of one-third, according to canon 2, the four daughters of C will each take one-fourth of one-third of the estate. This taking by representation is called succession *per stirpes*.

The general rule prevailing in this country is that where the heirs are related in the *same* degree, they take share and share alike. When related in *different* degrees, they take *per stirpes*.¹ Thus, in the illustration, the ten children of A, B, and C would each take one-tenth of the estate of the ancestor.

5. *On the failure of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations,* BEING OF THE BLOOD OF THE FIRST PURCHASER,—

¹ 4 Kent Comm. 391.

i. e., of the person who first received the grant of the estate from the lord. According to the ancient law, if A acquired a feud by purchase and died leaving no issue, the feud would escheat. Even his brother could not take, as he was not descended from A, the first purchaser.

A feud acquired by descent was called a *feudum antiquum*, and in case A acquired a feud by descent, and died without issue, B his brother could inherit as being of the blood of the ancestor. When the rigor of the feudal system was abated, in order to admit collaterals to the inheritance in the case of feuds acquired by purchase, it was customary in grants of feuds to grant them "to be held as *feuda antiqua*," that is, to be held with all the qualities of a feud derived from the purchaser's ancestors.

6. *The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.* The half-blood, at common law, could *never* inherit.

If A should die leaving two sons by different mothers, B, the elder, and C, the younger, and B should die, never having been actually seised, it is true that C, the half-brother, would inherit, not, however, in any sense as the heir of B, but as being the heir of the person last actually seised, namely, A. A kinsman of the whole blood is one descended from the same pair of ancestors.

7. *In collateral inheritances, kindred derived from male ancestors, however remote, shall be admitted before those derived from female ancestors, however near,—i. e., the relatives on the father's side, no matter how remote they may be, are admitted in preference to relatives on the mother's side, however near.* An uncle on the father's side would be admitted in preference to an uncle on the mother's side.¹

¹ For discussion of these rules see 2 Bl. Comm. 203 *et seq.*; 4 Kent Comm. 375 *et seq.*

CHAPTER XII.

TITLE BY PURCHASE.

Purchase is the possession of lands and tenements which a man has, *by his own act or agreement*, and not by descent.¹

There are five methods of acquiring a title to estates by purchase: *escheat, forfeiture, occupancy, prescription, alienation*.²

1. **Escheat** is the means by which, on the extinction of inheritable blood on the part of the person last seised, the lord acquired title to the estates of his tenant. Actual entry by the lord or the suing out of a writ of escheat, was necessary in order to complete his title.³

2. **Forfeiture** is the punishment annexed by law to some illegal act or negligence in the owner of real property, whereby he loses all his interest therein. At common-law forfeiture took place in eight ways⁴

a. By *crimes* and misdemeanors, such as treason, felony, etc.

b. By *alienation contrary to law*. Thus, if a tenant for life alienated in fee simple, he would forfeit his life estate. There is no forfeiture on this ground to-day. In the illustration the tenant would simply convey his life estate by his deed in fee simple.

c. By *non-presentation* to a benefice.

d. By *simony* or the corrupt presentation of any one to an ecclesiastical benefice or living for a reward;

¹ 2 Bl. Comm. 240 ; 4 Kent Comm. 441.

² 2 Bl. Comm. 244.

³ Id. 245.

⁴ 2 Bl. Comm. 267 *et seq.*

whereby the person entitled to present to the benefice or living lost his right to do so.

e. By *breach*, or non-performance of a condition annexed to an estate.

f. By *waste*. Waste is an injury to houses, gardens, trees, and other corporeal hereditaments to the disherison of the remainder-man or reversioner in fee simple or fee tail.

g. By *breach of copyhold customs*, as by disclaiming to hold of the lord.

h. By *bankruptcy*, whereby the title to property passes from the bankrupt to his assignees.

3. **Occupancy** is the taking possession of things which before belonged to nobody. The only instance at the common law where a title to real property could be gained by occupancy has been explained on page 31.

By *alluvion* is meant the formation of soil by the action of water; by *dereliction*, the rendering of soil available by the subsidence of water.

In *either* case, the property in the soil thus formed or rendered available lies in the adjacent owner.¹

4. **Prescription** is the title acquired in *incorporeal hereditaments* by virtue of their immemorial enjoyment by a person and those under whom he claims. By statute 32 Henry VIII. (1541), sixty years' enjoyment was essential to prove title by prescription. Twenty years' enjoyment is now essential. When a person prescribed in himself and those whose estate he held, he was said to prescribe in a *que estate*.

When he prescribed as having received the right from his ancestors, he was said to prescribe in *himself and his ancestors*. In the former case he can prescribe for nothing that is not appendant or appurtenant to

¹ 2 Bl. Comm. 281; 1 Wash. R. P. 107 *et seq.* See *post*, page.

² 2 Bl. Comm. 261.

lands; in the latter he can prescribe for anything that can lie in grant, not only for things appendant or appurtenant, but also for such as may be in gross,—*i. e.*, rights pertaining to persons and having no connection with the ownership of land.¹

5. By **alienation** is meant any method whereby estates are resigned by one man and accepted by another. The legal evidences of this transfer of property from one person to another are called *common assurances*. They are of four kinds.¹

a. By *matter in pais*, or deed, namely, an assurance transacted between private persons *in pais*,—*i. e.*, in the country; and, under the ancient common law, upon the very property to be transferred.

b. By *matter of record*,—*i. e.*, an assurance transacted in the public courts of record.

c. By *special custom* prevailing in certain localities, or applying to certain species of property.

d. By *devise*.

¹ 2 Bl. Comm. 263 *et seq.*

² *Id.* 294.

CHAPTER XIII.

ALIENATION BY DEED, ETC.

A deed is a writing sealed and delivered by the parties. A deed made by two or more parties was called an *indenture*, as regularly there were as many copies as there were parties. The copies were made on one piece of parchment and were then severed from one another by an indented line. A deed executed by one party was not indented, but was cut in a straight line and was called a *deed poll*.¹

There are eight requisites for every good deed.²

1. There must be *parties* able to contract, and a *proper subject-matter* to be contracted for. A good deed could not be given to an imaginary tract of land.³

2. There must be a *good and sufficient consideration*, and to bind creditors the consideration must be valuable.⁴

3. The deed must be *written* or *printed*, and upon paper or parchment.⁵

4. The matter written must be *legally and orderly* set forth.⁶

5. The deed must be *read* when any of the parties desire it, and if not read at the request of any party, it is *void* as to him.⁷

6. It must be *signed* and *sealed*. In some States a

¹ 2 Bl. Comm. 295 ; 4 Kent Comm. 450 ; Tied. R. P. § 786.

² 2 Bl. Comm. 296 *et seq.*

³ Tied. R. P. §§ 791, 797, 799.

⁴ Tied. R. P. § 801 ; 3 Wash. R. P. *613 ; see *Washband v. Washband*, 27 Conn. 424.

⁵ Tied. R. P. § 788.

⁶ 2 Bl. Comm. 297.

⁷ 2 Bl. Comm. 304 ; Tied. R. P. § 811.

scroll with the pen may take the place of a seal; in others not.¹

7. It must be *delivered*. A deed takes effect only from its delivery. In the absence of evidence to the contrary, the delivery is presumed to have taken place on the day of the date. A deed delivered to a third person to be held by him until the performance of some condition is called an *escrow*. A delivery prior to the performing of the condition is void. An escrow takes effect from the time of its delivery to the grantee.²

8. It must be *attested*, or executed in the presence of witnesses. As a general rule attestation is not necessary in the United States in order to give the deed validity between the parties. It is required only for purposes of record. In some States an acknowledgment before a magistrate is requisite to the validity of a deed as between parties.³ It might be added as a *ninth essential* of a deed, so far as third parties are concerned, that it be *recorded*. An innocent purchaser *without notice* of an unrecorded deed, takes a good title as against such a deed. The recording of a deed is constructive notice of the deed to all the world. But the record of a deed which does not comply with all statutory requirements and formalities is notice to no one.⁴

The general American doctrine is, that when a grantee has left a deed with the proper officer for record, he has done all that can be required of him, and that any failure on the part of the official to actu-

¹ 4 Kent Comm. 450; Tied. R. P. §§ 807, 808.

² Tied. R. P. §§ 812, 815; 4 Kent Comm. 454; see *Johnson v. Bard*, 4 Johns. 230; *Jackson v. Rowland*, 6 Wend. 666; *Stiles v. Brown*, 16 Vt. 563.

³ 3 Wash. R. P. *572; see Tied. R. P. § 809; *Dole v. Thurston*, 12 Met. 157; *Dougherty v. Randall*, 3 Mich. 581.

⁴ Tied. R. P. §§ 816, 817; 3 Wash. R. P. *591; 4 Kent Comm. 456; *Galpin v. Abbott*, 6 Mich. 17; *Blood v. Blood*, 23 Pick. 80.

ally place the deed on record, or any error in the recording, does not affect the rights of the grantee. That is, if B, the grantee, leaves a properly executed deed with the proper official, but a proper record is not made, B holds the property as against any subsequent claimant who may have been misled by the imperfect record. This is not the universal doctrine, however.¹

The following are the FORMAL parts of a deed :²

a. The *premises*, which commonly contain the names of the parties, the consideration, the estate conveyed, and a description of the property. In the description of land known and fixed *monuments* control *courses* and *distances*. Metes and bounds, if certain, convey all the land included within them, though the amount thus included differs from the amount of land as stated in the deed.³

b. The *habendum*, which also points out the estate, or interest conveyed. The habendum may, in this respect, *enlarge, qualify, or explain* the premises, but it cannot be repugnant to them. If an estate were given in the premises to A in fee simple, and in the habendum to A in fee tail, the latter would prevail and A would take an estate tail.

If an estate was granted to A in fee simple, however, in the premises, and in the habendum it was limited to A for life, the premises would prevail, and A would take an estate in fee simple.⁴ The words "to have, etc.," form the habendum clause.

c. The *tenendum* (to hold) was anciently used to indicate by what species of *tenure* the estate was held.

d. The *reddendum*, which contains the *exceptions*

¹ See *Manhattan Co. v. Laimbeer*, 108 N. Y. 578 ; *Chandler et al. v. Scott*, 127 Ind. 226.

² Bl. 2 Comm. 298 *et seq.*

³ 4 Kent Comm. 466 ; Tied. R. P. §§ 826, 827, 831.

⁴ 2 Bl. Comm. 298 ; see Tied. R. P. § 844 ; 3 Wash. R. P. *642.

and *reservations*, if there are any. A reservation is a creation of some *new* right in the grantor, out of the thing granted, as a reservation of a right of way over the premises conveyed. An exception is always of a *part* of the thing granted, as a conveyance of a certain tract of land by metes and bounds, "excepting the trees and woods." A reservation cannot be made in favor of a third party, on account of lack of privity.¹

e. The *condition*, if there is any,—*i. e.*, a clause of contingency, on the happening of which the estate granted may be defeated.

f. The *warranty*, by which the grantor, for himself and his heirs, warrants and secures to the grantee the estate granted. Warranties were, at common law, of two kinds, *lineal* and *collateral*.

1. Lineal warranty was where the heir derived, or might derive, his title to the land warranted either from or through the ancestor, who made the warranty. As, if A has two sons, B, the elder, and C, the younger, and upon being disseised, either A or B releases to the disseisor with warranty; this would be a lineal warranty with regard to C, the younger son.

2. Collateral warranty was where the heir's title neither was nor could have been derived from the warranting party. Thus, if a younger brother should release, with warranty, to his father's disseisor, this would be collateral to his elder brother. In either case the heir was not bound to make restitution to his ancestor's grantee, if the latter were evicted, unless he had received sufficient lands to enable him to do so from the ancestor. But in both lineal and collateral warranties, the heir was barred from asserting any title to the lands warranted, because, if successful in his suit, he would at once have assets descended from the

¹ Tied. R. P. § 843; 3 Wash. R. P. *645.

warranting party, a fact which would render him liable to the said party's grantee.¹

g. Common law warranties never had any operation in this country.²

Their purpose is accomplished by the *covenants*, which are clauses of agreement by which the grantor stipulates for the truth of certain facts or binds himself to perform or give something to the grantee. THERE ARE COMMONLY FIVE COVENANTS in a deed :

(1). *That the grantor is lawfully seised.*

(2). *That he has a good right to convey.*

(3). *That the land is free from encumbrances.*

(4). *That the grantee shall quietly enjoy.*

(5). *That the grantor will warrant and defend the title against all lawful claims.*³

(1), (2) and (3) are *personal* covenants and do not *run with the land*. They are broken, if they are broken at all, as soon as they are made, and the grantee has a right of action, which, at common law, could not be sold or assigned. If A conveys to B, with the covenant against encumbrances, and B conveys to C, C cannot avail himself of A's covenant with B.⁴

(4) and (5) are covenants that *run with the land*; that is, they are covenants the right to sue upon which when broken passes to any subsequent grantee. Thus if A should convey to B with covenants (4) and (5), and by successive conveyances the land should come to M, then if M were evicted he could sue A upon the covenants (4) and (5) contained in the deed from A to B.⁵

If covenants (1) and (2) are broken, the measure of damages is the *consideration money and interest*. As a general rule, the grantee can recover nothing for improvements or increased value of the land. If cove-

¹ 2 Bl. Comm. 301.

² 4 Kent Comm. 470.

³ 4 Kent Comm. 471 ; See Tied. R. P. § 849.

⁴ Id. §§ 450, 452.

⁵ 3 Wash. R. P. 659 ; Tied. R. P. § 862.

nant (3) is broken, the damages are the same as in covenants (1) and (2), if the encumbrances exhaust the value of the land. If the grantee has not extinguished the encumbrance and there has been no eviction he is entitled only to *nominal damages*.

If covenant (4) is broken by eviction, the measure of damages is the same as in covenants (1) and (2). If covenant (5) is broken, in some States the measure of damages is the same as in covenants (1) and (2), while in others it is the value of the land at the time of eviction.¹

A deed may be avoided in five ways.²

1. By *erasure*, *interlineation*, or other alteration in any material part, unless a *memorandum* accounting for the alteration be made at the time of the execution. This common-law rule has been greatly modified. The question as to whether an alteration was made before or after execution is one for the jury, who should presume that the alteration was properly made, unless there are suspicious circumstances to the contrary.³

If the alteration is suspicious on its face, as if it were in a different handwriting from that of the rest of the deed, the burden of proof should be on the party offering the instrument to account for it.⁴

2. By *breaking off* or *defacing* the seal. This must be by the party to whom the other is bound.⁵ An accidental injury to the seal does not affect the validity of the deed.

3. By *delivering* it up to be *cancelled*.

4. By the *disagreement* of those whose concurrence is

¹ 4 Kent Comm. 474; Tied. R. P. § 861; 3 Wash. R. P. *673 *et seq.*

² 2 Bl. Comm. 308.

³ Beaman's Admrs. v. Russell, 20 Vt. 213; for collected cases see 1 Greenl. Ed. § 564; there is considerable conflict of authority.

⁴ Jackson v. Jacoby, 9 Cow. 125; Wilde v. Armsby, 6 Cush. 314.

⁵ Touchstone, c. 4, §§ 6, 2.

necessary to the validity of a deed, as in the case of a wife's refusing to relinquish dower.

5. By *decree of court*, as in case of fraud, etc., in the obtaining of the deed.

Conveyances are divided into two *classes*, conveyances at *common law* and conveyances which arise from the *Statute of Uses*.

Conveyances at common law are divided into *primary* or original conveyances, by which an estate is created, and *secondary* or derivative conveyances, by which some previously created estate is enlarged, restrained, transferred, or extinguished.¹

Of the *primary conveyances* there are six species—*feoffment, gift, grant, lease, exchange, partition*.

1. A feoffment was the mode of conveyance in the earliest periods of the common law. It meant originally the conveyance of a feud or fee, but came in time to signify the conveyance of an inheritance *in fee*. The instrument itself was in form much like the forms used for the same purpose in the New England States.² The peculiarity was that it was accompanied with *actual delivery of possession* of the land, termed *livery of seisin*. The feoffor entered on the land with the deed of feoffment and gave to the feoffee a clod or turf in the name of seisin of all the lands contained in the deed. This was called livery of seisin *in fact*.

Livery of seisin *in law*, or symbolical livery, was also permitted, and occurred when, it being for any reason undesirable to actually enter, the parties went in sight of the land and the feoffor directed the feoffee to enter and take possession. Livery in law must be given and received by the parties themselves. Livery in fact could be performed by attorneys on both sides.³

2. A gift was the instrument by which an *estate tail*

¹ 2 Bl. Comm. 309 *et seq.*

² 4 Kent Comm. 480.

³ 2 Bl. Comm. 315, 316.

was created. It differed from a feoffment only in the estate created by it.

3. A grant was the instrument by which the title to *incorporeal hereditaments* was conveyed. The delivery of the instrument perfected the conveyance, no delivery of the property being possible. It differs from a feoffment only in the nature of the property conveyed.

4. A lease is a conveyance of lands and tenements for a *less time than the lessor has* in the premises; as if A, the owner of an estate in fee, should lease to B for life; or B, the tenant for life, should sublet to C for years.

5. An exchange is the *mutual grant of equal interests*, the one in consideration of the other. The estates exchanged must be equal in quantity, as fee simple for fee simple, a lease for ten years for a lease for ten years, etc. Livery of seisin, even in the conveyance of freeholds, is not necessary.

6. A partition is when two or more joint tenants, tenants in common, or coparceners *agree to divide the lands* so held among them, in severalty.

The *secondary* conveyances are divided into five species—*release, confirmation, assignment, surrender, and defeasance*.

1. A release is a conveyance of a man's rights in lands and tenements to another who has an estate in *possession*; as if A, the remainder-man or reversioner, should release to B, a tenant for life.

2. A surrender is a conveyance by which a man having an estate in possession conveys this estate to the *remainder-man* or *reversioner*; as if A, a tenant for years, should release his term to B, the reversioner.

3. A confirmation is a conveyance by which a *voidable estate* is *made sure*, or a particular estate is increased. If A, a tenant for life, leases to B for forty years, and C, the reversioner, confirms the lease to B,

the latter becomes sure. The second branch of the definition is illustrated by the case given under the head of release.

4. An assignment is the transfer from one person to another of the *whole* of an interest in any estate ; it is commonly applied to estates for life or years. It differs from a release only in that, by an assignment, the *whole* interest is conveyed, while in a lease there is a reversion in the lessor.

5. A defeasance is a *collateral* deed, made at the same time with another conveyance, *containing certain conditions* upon the performance of which the estate created by the conveyance may be defeated. Illustrations may be found under mortgages.¹

¹ For authority upon all these conveyances see 2 Bl. Comm. 310 *et seq.*

CHAPTER XIV.

USES, STATUTES OF, CONVEYANCES UNDER, ETC.

1. In order to understand the subject of uses, and the various results which developed from them, it is necessary to briefly survey the statutes of *mortmain*.

At common law, corporations could not become purchasers of land without a license from the king ; for the king, as being the ultimate lord of every fee, ought not to be deprived of his *right of escheat*, without his consent, as would be the case in grants to corporations where the extinction of inheritable blood was practically impossible. Alienation to a corporation was called alienation in mortmain (*in mortua manu*). When it became difficult for ecclesiastical corporations to obtain these licenses, they resorted to various devices to avoid the necessity of obtaining them, and the so-called statutes of mortmain, extending through a long series of years, from 1217 to 1536, were passed to thwart the cunning of the ecclesiastics.

The first plan of the churches was to receive conveyances from persons wishing to convey their lands to them, and to reconvey them instantly to the grantors, to be held by them as tenants of the corporations. Then by some pretext of forfeiture or escheat, the corporations would take possession of the lands. This course was met by a charter of Henry III. (1217), enacting that all such attempts should be void and that all lands thus alienated should be forfeited to the lord. This charter applied only to ecclesiastical houses, and not to bishops, etc. The aggregate ecclesiastical organizations also evaded it by taking long leases, as of a

thousand years, which were not within the terms of the charter. This led to the statute *de religiosis* of 7 Edward I. (1281), which enacted that no person should buy, sell, or receive, under the pretence of a gift or term of years; or should by any act of ingenuity appropriate to himself any lands or tenements in mortmain, the penalty being forfeiture. To avoid this act, the corporations resorted to what subsequently developed into a method of barring estates tail, and which was called a *common recovery*. They alleged some fictitious title to land, brought suit against the tenant, who was in collusion with them, and recovered the land by virtue of their alleged prior title. Of course, collusion on the part of the tenant was essential to this proceeding. Against this device the statute of 13 Edw. I. was aimed, directing that in such cases a jury should try the true right of the demandants, and if no right was found to exist, the land should be forfeited to the lord. The next device of the ecclesiastics was the invention of *uses*, the idea of a use being obtained from the *fidei commissum* of the civil law, which was the disposal, usually by will, of an inheritance to one, in the confidence that he would convey it or dispose of the profits according to the will of another.

A use at common law was where the *legal* estate of lands was in A, while the *right to the rents and profits* was in B.¹ A's estate was called the *legal* estate, because it was the only estate that the common-law courts recognized, while the use in B was enforced by courts of equity. By this device, namely, the invention of an estate never contemplated by the statutes of mortmain and not within their reach, the ecclesiastics hoped to evade them. The statute of 15 Richard II. (1392) met the emergency, by providing that the statutes of mortmain should thenceforth operate upon

¹ 4 Kent Comm. 290.

uses. The latter had become firmly established, however, and although no longer available for the purpose of eluding the statutes of mortmain, they were so useful for other ends that they increased in importance and number. Among other advantages, by resorting to uses lands could be devised, a thing impossible at common law. The owner of a use could devise it, and the common method was that A should convey his lands to B, to hold to the use of A during life, and on his death to such uses as he, A, should declare in his last will and testament. If an estate were given to B and his heirs, to the use of C and his heirs, C could devise his use by will.

Uses, however, opened the door to fraud, as they occasioned general uncertainty as to the true ownership of land. Moreover, they could not be reached by legal process by the creditors of the *cestui que use*, and neither curtesy nor dower existed in them.

II. To remedy these evils several statutes were passed, and among them the so-called "Statute of Uses," 27 Henry VIII. (1535), which enacted, "that when any person shall be seised of lands to the use of any other person, the person entitled to the use shall thenceforth be seised of the land." That is, the statute united the possession to the use, making the *cestui que use* the *legal* as well as the *equitable* owner of the estate. This was termed *executing the use*. The statute aimed to destroy the estate of the feoffee to uses. If, after the passage of the statute, an estate were given to A and his heirs to hold to the use of B and his heirs, by the force of the statute the legal estate in A would be vested in B, and the latter would be as completely in possession in the eye of the law as if there had been a direct feoffment to him.¹

¹ See 2 Bl. Comm. 268 *et seq.*, 328, 335; 4 Kent Comm. 490-497; Tied. R. P. §§ 459-463; Williams R. P. *155 *et seq.*

The object of the statute was, however, largely defeated by the construction placed upon it by the courts of common law. They decided that a use could not be limited on a use, that such a limitation was void. By this construction, if an estate were given to A and his heirs to the use of B and his heirs, in trust for C and his heirs, the statute only executed the first use,—*i. e.*, gave the entire estate to B and his heirs, and the limitation to C and his heirs was void. There was no sound reason why the statute should not have executed any number of uses, nor why in the case just mentioned, when it had placed the legal estate in B, it should not also have executed the use in C and given to him the entire estate.

The courts of equity, however, taking advantage of the construction of the common-law courts, held that C was equitably entitled to the estate, in the above case, and proceeded to enforce his right as they had those of the *cestui que use*, prior to the statute of uses, the equitable estate being called a *trust* instead of a use.

III. Thus the only practical effect of the statute of uses was to give rise to three new species of secret conveyance. By the statute, when a use was created, the possession and seisin were instantaneously attached to the use, and no delivery of possession to the *cestui que use* was essential to completely vest the entire estate in him. Hence arose:

1. *The covenant to stand seised*, by which a man, seised of lands, covenants, in consideration of *blood* or *marriage*, that he will stand seised of the same to the use of his wife, child, or kinsman, etc. The instrument created a use, and the statute put the seisin in the *cestui que use*.

2. *Bargain and sale*; a contract by which the bargainor, for some pecuniary consideration, bargains and

sells, that is, contracts to convey the land to the bargainee. This creates a use in the bargainee, and the statute of uses united the possession to the use, thus making the title perfect in the bargainee.

To avoid the secrecy with which estates were thus conveyed, it was enacted by 27 Henry VIII. (1535) that such bargains and sales should not pass a freehold *unless they were recorded* within six months in one of the courts of Westminster Hall or with the *custos rotulorum* (the chief civil officer in each county). This statute did not apply to bargains and sales of *chattel* interests, however, and this led to the invention of

3. *The lease and release*, developed by Sergeant Moore. A bargain and sale upon some pecuniary consideration, for one year, was made by the freeholder to the bargainee. This created a use in the latter, and the statute of uses vested him with the possession. Being thus in possession, a release was given him by the freeholder, who thus conveyed his estate, with entire secrecy, as neither the lease nor the release were required to be enrolled.¹

Uses, as they existed prior to the statute of uses, are divided into four classes.

a. *Shifting*, or *secondary* uses take effect *in derogation of some other estate*, and are created by deed; as an estate to A and his heirs, then to B and his heirs, provided B pay to A \$100 at a certain time.


b. *Springing uses* are those which are limited to arise on a future event, where no preceding estate is limited, and they *do not take effect* in derogation of any preceding interest, as a grant by A to B in fee, to the use of C in fee, after the first day of January next. Here there would be a resulting use to A until the first of January.

¹ For these conveyances see 2 Bl. Comm. 338 *et seq.*; Walker Am. Law 401; Tied. R. P. §§ 774 *et seq.*; Williams R. P. *180 *et seq.*; 4 Kent Comm. 492 *et seq.*

c. Future or contingent uses are those which are limited to take effect as remainders: as a grant to A in fee to the use of B in fee on his return from Rome.

d. Resulting uses are those in which the use enured to the grantor when the use created by the grantor *expired* or could *not vest*, or was not to vest except upon a *contingency*, as in *b.*¹

¹ For these uses see 2 Bl. Comm. 334; 4 Kent Comm. 296; 2 Wash. R. P. *133, *276 *et seq.*



✓ CHAPTER XV.

ALIENATION BY MATTER OF RECORD AND SPECIAL CUSTOM.

Assurances by matter of record are such as do not depend entirely on the act or consent of the parties, but the sanction of a court of record is called in to preserve and be a perpetual record of the transfer of property. They are of four kinds,—*private acts of Parliament*, the *king's grants*, *finés*, *common recoveries*. Only the two latter require particular attention.¹

A **fine** is an amicable settlement of a suit, by leave of court, whereby the lands in question are acknowledged to belong to one of the parties. The term *finés* was used because this proceeding *put an end* to all controversy regarding the land in dispute. *Fines* were largely resorted to as a means of *barring estates tail*, the statute of 37 Henry VIII. (1546) giving them this effect, an effect which, with considerable doubt, they were thought to have at common law. There were six steps in the levying of a fine.

1. The *writ of covenant*. Suppose A, a tenant in tail, wishes to alienate his estate to B, so as to bar the entail, by a fine. B begins an action of covenant against A, the foundation of the action being a fictitious covenant by A to convey the lands to B.

2. *The license to agree*. A is now supposed to make overtures of settlement to B, and the latter applies to the court for leave to agree with A, a request which is readily granted.

¹ For these conveyances and statements in the text see 2 Bl. Comm 348 *et seq.*; Williams R. P. *44 *et seq.*; 1 Wash. R. P. *70, *71.

3. The *concord*, or *agreement*, which is an acknowledgment from A that the lands in question belong rightfully to B. After this acknowledgment is made, A is called the *cognizor* and B the *cognizee*.

4. The *note*, which is merely an abstract of the writ of covenant and of the concord.

5. The *foot*, which includes the whole matter, containing the parties, day, year and place, and before whom it was acknowledged.

6. The *proclamation*, which was the reading in open court of the record of the fine. The number of readings varied with the different statutes passed in relation thereto.

The effect of a fine was to bar the claims to the estate thus conveyed of *parties*, *privies*, and *strangers*. By parties are meant the cognizor and cognizee. By *privies*, such persons as are in any way related to the parties who levy the fine. *Strangers*, or all other persons in the world, were also bound by the fine, unless, within five years after the proclamations were made, they interposed their claims. Persons having a future interest, as a remainder or reversion, were allowed five years in which to assert their claims after their rights accrued.

Common recoveries, as first employed by the ecclesiastics, were mentioned on page 70. They were chiefly used as a means of barring estates tail, since by them the rights of remainder-man and reversioner were barred, as was not the case with the fine. Suppose A, the tenant in tail, wishes to convey his estate to B by a common recovery. B, the recoveror, begins an action against A, the recoveree, by a writ called a *præcipe quod reddat*, in which he alleges that A has not title to the lands in question, but came into possession of them after he, B, had been wrongfully turned out by some third party. A appears and asks

that C, who warranted the lands to him, be called in to defend the title. This is called the *voucher* of C, and C is called the *vouchee*. C appears to defend the title, whereupon B asks leave to *imparl*, or confer with, the vouchee, C, in private. The leave is granted, whereupon the vouchee *disappears* or is defaulted, and then judgment is given in favor of B, to recover the lands in question from the tenant A, while A receives a judgment *for lands of equal value* against C, the vouchee. The vouchee, C, who was usually the crier of the court, and who was called the *common vouchee*, had no lands, so that although A had a nominal recompense in the record for the lands lost to him, it practically amounted to nothing. This proceeding was held to bind the remainder-man and reversioner, because they could look for the satisfaction of their claims to the lands *supposed to have been recovered by A from C*, the common vouchee. Sometimes two or even three vouchees were employed, but the proceeding was in this case substantially like the one just described.

Alienation by special custom applied especially to copyhold estates, which could not be conveyed directly from one copyholder to another on account of their peculiar nature, they being technically estates at will.¹ The method of conveyance was for the copyholder to make to the steward of the lord's court, as agent of the lord, a *symbolic delivery* of the lands, together with an instrument called a *surrender*, in which the surrenderor states, in the form of a request, the disposition which he wishes the lord to make of the property, the person to whom he wishes it granted, etc. The common law rendered the execution of these directions *obligatory on the lord*. In order to devise a copyhold, it must be surrendered to such uses as should be declared in the will.²

¹ 2 Bl. Comm. 147.

² Id. 365 *et seq.*

CHAPTER XVI.

ALIENATION BY DEVISE—LEGACIES.

Alienation by devise is the disposition of a man's property contained in his last *will* and *testament*.¹ As has been seen, lands could not at common law be devised, and hence uses were resorted to for that purpose. When the statute of uses temporarily destroyed these equitable estates, the disposal of lands by will was impossible, and this led to the passage of the statute of wills, 32 Henry VIII. (1540), five years after the adoption of the statute of uses, by which all persons seised in fee simple, except *married women, infants, idiots, and persons of non-sane mind*, could devise *two-thirds* of their lands held in chivalry, and the whole of those held in socage. The statute of 12 Charles II. (1660) reducing all tenures to free and common socage, copyholds being the only important exception, enabled owners to devise the whole of their real property.² Originally, a man could devise only *one-third* of his *personal property*, but this restraint gradually wore away until he could dispose of the whole.³

✓ **Parties.**—The general rule is that all *parties* are competent to make a devise, with the exception of those mentioned in the statute of wills.⁴ The capacity of married women in this respect is regulated by statute in the different States. Any parties, however incompetent to make a will, can be themselves *devisees*.⁵

At common law a male infant could devise chattel:

¹ 2 Bl. Comm. 372.

² Id. 375.

³ Id. 492; Schouler Wills § 14.

⁴ Id. § 31.

⁵ 4 Kent Comm. 506.

at the age of *fourteen*, and a female at the age of *twelve*. The age of capacity has been increased throughout the United States, and, in many, an infant is incompetent to dispose of personal property by will. No infant could ever devise real property, except by special custom.¹

Execution.—The general rule is that a will of *real estate must be in writing and subscribed by the testator, and acknowledged by him in the presence of at least two witnesses, who are to subscribe their names as witnesses.*²

At common law a will of *personal* property was good without writing.³ Such a will is called a *nuncupative* will. These wills are now valid only when made by a *soldier* in actual military service, or by a *mariner* while at sea.⁴

Unless there be a statutory regulation to the contrary, the testator need not sign his name at the end of the will, provided that the body of the will be in his handwriting, that his name appear in it, and that he intended to sign the instrument by thus writing his name in the body of it.⁵

The testator need *not* sign the will in the *presence* of the witnesses. An *acknowledgment* that the signature is his is sufficient. The witnesses need not attest the will in the presence of each other, though this is usually done.⁶

When the witnesses are required to sign in the presence of the testator, *constructive presence is sufficient*, such as being in an adjoining room and in such a position that the testator can see them if he wishes. But if the testator is *unconscious*, or *cannot see* the witnesses sign, such attestation is *void*.⁷

¹ 4 Kent Comm. 506; Schouler Wills §§ 39, 43; 1 Jarm. Wills 33.

² 2 Bl. Comm. 376; 4 Kent Comm. 513.

³ 4 Kent Comm. 516.

⁴ Schouler Wills §§ 360, 364.

⁵ Id. § 312; 1 Redf. Wills. *211.

⁶ 4 Kent Comm. 515, and cases cited; 1 Redf. Wills *219.

⁷ Schouler Wills §§ 340 *et seq.*

Originally, if any one of the witnesses was a legatee under a will, the will was void, but the general rule now is that the bequest *to that witness* only shall be void.¹

Revocation.—Wills may be revoked in four ways.²

1. *By the destruction or cancellation* of a will, with the intention to revoke it. Alterations made after the will has been executed should be duly attested, or they will be void.

2. *By the making of a subsequent will.*

3. *By such a change of circumstances* as will lead to the *presumption* of an *intention to revoke*. Such a change of circumstances consists in marriage and the birth of a child, subsequent to the making of a will. Both these circumstances must exist; one alone is not sufficient.³

4. *By the disposal, during life, of the property devised.* In case a man by will disposes of a particular parcel of land, and then alienates it, the will is void as regards the land, and a subsequent repurchase does not bring it under the operation of the will.⁴

LEGACIES.

Legacies are bequests or gifts of *goods* and *chattels* by testament.⁵ They may be divided into five classes.

1. *General* legacies, or those which are not answered by any particular portion of the estate the delivery of which will alone fulfil the intent of the testator; as a bequest to A of one thousand dollars.

2. *Specific* legacies, or those which will be answered only by the delivery of some *particular portion* of the estate;⁶ as a bequest to A of ten shares of some par-

¹ Schouler Wills § 357; 2 Bl. Comm. 377.

² See Schouler Wills § 380.

³ *Brush v. Wilkins*, 4 Johns. Ch. 506; *Warner v. Beach*, 4 Gray 162; *Walker v. Hall*, 34 Pa. St. 483. See local statutes.

⁴ 4 Kent Comm. 529. See local statutes. Also 1 Redf. Wills *333 *et seq.*

⁵ 2 Bl. Comm. 512.

⁶ 2 Redf. Wills *132.

ticular stock, or of some specific piece of furniture. In case the estate is not sufficient to pay all the debts and legacies, the specific legacies do not abate until all the others are exhausted. Neither can a specific legatee look to any property *other than that specified* for the satisfaction of his legacy.¹

3. *Demonstrative* legacies, or those where a certain amount of money is given to come out of a particular fund. Such a legacy does not fail if the particular fund is changed, nor does it abate if the estate is not sufficient to meet all claims.²

4. *Lapsed* legacies, or those in which the *legatee dies* before the testator.³

5. *Contingent* legacies, as an estate to A, when or if he attain the age of twenty-one.⁴

The Cy Pres doctrine is the rule of construction applied to a *will* by which, when the testator evinces a *particular* and a *general* intention, and the particular intention *cannot take effect*, the words shall be so construed as to give effect to the *general intention*. It is principally applied to sustain bequests for charity. Where there is a definite charitable purpose which cannot be effected, the courts will not substitute another; but if charity be the general substantial intention, courts will find some means of effectuating it, though the method provided for its execution fails, even by applying the fund to a different purpose from that contemplated by the testator, *provided only it be charitable*. This doctrine is not universally accepted in the United States.⁵

¹ 2 Redf. Wills *135.

² Id. *136.

³ Id. *158; 2 Bl. Comm. 573.

⁴ Id.

⁵ Bisp. Eq. § 126 *et seq.*; 2 Redf. Wills *357 *et seq.*

CHAPTER XVII.

PERSONAL PROPERTY.

Personal property comprises all property *not of a freehold nature, nor descendible to the heirs-at-law*. It may be divided into

1. *Chattels real*, or interests annexed to or concerning the realty, as a lease for years.

2. *Chattels personal*, consisting of tangible and movable property, not attached to the realty.¹ Under this head the doctrine of fixtures may be considered.

Fixtures consist of personal property which has been *attached to the realty*, but which still *retains its character as personal property* and may be removed by the person attaching it to the realty, or his personal representatives.² This was in derogation of the common law, which regarded all things attached to the realty as becoming a part thereof.³

In determining whether an article is a fixture, the *manner of its attachment* and *the difficulty of*, and injury likely to be caused *by*, its removal, and particularly the *intention* of the parties, are to be considered.⁴ The question as regards fixtures commonly arises in five instances.

a. Between *heir* and *executor*, where the construction is in favor of the *heir*.

b. Between the *personal representatives* of the tenant for life, and the *remainder-man* or *reversioner*, where

¹ 2 Kent Comm. 340, 341.

² Ferard. Fixt. 2; Schouler Per. Prop. § 112. There is some confusion in the use of the term, however. See Ewell Fixt. 1.

³ 2 Kent. Comm. 343.

⁴ Tied. R. P. § 3; 1 Wash. R. P. *6.

the construction is in favor of the *personal representatives*.

c. Between *landlord* and *tenant*, where the construction is most strongly in favor of the *tenant*.

d. Between *vendor* and *vendee*, where the construction is in favor of the *latter*.

e. Between *mortgagor* and *mortgagee*, where the construction is in favor of the *latter*.¹

The English rule, that courts are more ready to construe as fixtures articles used for purposes of *trade* and *manufacture* than those used for agricultural purposes, does not hold in the United States.²

Personal property may also be divided into

1. *Choses in possession*, and

2. *Choses in action*, or rights not reduced to possession, but which may be enforced by an action at law, such as bonds or promissory notes.

Remainders may be limited in all chattels of a durable nature. If there is a specific bequest of a chattel whose use involves its consumption, as of hay or grain, with remainder over, the latter is void. If, however, the bequest is general, the property should be converted into money and the principal reserved for the remainder-man.³

Title to personal property may be acquired in three ways: by *original acquisition*, by *act of law*, by *act of parties*.

1. Title by original acquisition may be acquired

(a). By *occupancy*. This right is now confined to *goods found upon the surface of the earth*, when the finder is justified in *appropriating them to his own use*, in case the owner cannot be found.⁴

¹ Tied. R. P. § 3; 1 Wash. R. P. *6. See 2 Kent Comm. 345.

² 1 Wash. R. P. *3. For discussion of cases see Ewell Fixt. 110.

³ 2 Kent Comm. 351 *et seq.*

⁴ Id. 357; see 2 Schouler Per. P. § 6 *et seq.*

(b). By *accession*, and *confusion* of goods. Accession is the right to all which one's property produces, and the right to that which is united to it by accession, either naturally or artificially. This includes the right to the *produce of the soil*, the *natural increase* of animals, etc. It is held that if a person hires animals for a certain time, he is entitled to the young born during that time, he being regarded as the temporary proprietor.

If A by his labor unites to his own property the property of B, he becomes the owner of the latter by right of accession. A *wilful trespasser* cannot, however, gain a title to the property of another under this principle, and the true owner can reclaim and take his goods in whatever form they may exist, provided he can trace and identify them. If A should take logs belonging to B, convert them into boards, and the latter into boxes, B could assert his property in the boxes, provided he could prove that they were made from his logs.¹

In case of confusion of goods, if the mixture was *by common consent*, the owners are tenants in common.

If the mixture was made *wilfully* by one party alone, he loses his right in the property unless he can distinguish it from that with which it was intermingled, or unless it was equal in value to that with which it was intermingled.²

(c). By intellectual labor, the rights to the profits of which are protected by patents and copyrights.

2. Title by *act of law* may be acquired

(a). By *forfeiture*, as for various crimes. Title by forfeiture has practically no existence in the United States. A peculiar instance of forfeiture at common law occurred in the case of *deodands*, which were personal chattels which were the immediate occasion of

¹ 2 Kent Comm. 361 *et seq.*

² Id. 364 ; 2 Schouler Per. P. § 37.

the death of any reasonable creature, and which were thereupon forfeited to the king.¹

(b). By *custom*. The most important illustrations of a title thus acquired are *heriots*, *mortuaries*, and *heir-looms*. Heriots are customary tributes of goods and chattels, payable to the lord upon the decease of the tenant. They were sometimes the best beast, or best piece of furniture, etc. Heriots existed chiefly in copyhold estates.

Mortuaries were practically ecclesiastical heriots, being a customary gift claimed by the minister in many parishes upon the death of parishioners.

Heirlooms are goods and chattels which by special custom go to the heir with the inheritance, instead of to the personal representatives of the deceased.²

(c). By *judgment*. When a judgment is recovered against a defendant in trespass or trover, the title to the goods, for the conversion of which the action was brought, vests in the defendant.³

(d). By *insolvency*, by which, according to the laws of the different States, or by the national bankrupt law, when such a law is in force, the title to the goods of the insolvent is taken from him and vested by legal process in another, who is to dispose of the property according to law for the benefit of the creditors of the insolvent.⁴

(e). By *prerogative*. This has no operation in this country. By it, at common law, the king was entitled to *waifs*, or goods thrown away by a thief in his flight; *wrecks*, or vessels ashore after being abandoned by their crews; and *estrays*, or wandering cattle whose owners were unknown.⁵

(f). By *intestacy*, as when a person dies, leaving

¹ 1 Bl. Comm. 300.

² 2 Bl. Comm. 421 *et seq.*

³ 2 Kent Comm. 388.

⁴ Id. 389.

⁵ 1 Bl. Comm. 290 *et seq.*

personal property undisposed of by will.¹ Here, by the authority of the proper court, the title to such property is vested in an *administrator*, whose duties are defined by statute, but which may be summarized as follows:

(1.) *To make an inventory of the estate of the deceased.*

(2.) *To collect the outstanding debts, convert the property into money, and pay the debts due from the estate.* The order in which debts are to be paid is prescribed by statute. At common law the order was: funeral charges; debts due the State; debts of record, as judgments; debts arising from instruments under seal; debts arising from simple contracts.

(3.) *To distribute the estate to those who are by law entitled to it.*²

Students should examine the statutes on this point.

Executors are the persons appointed by a testator to carry out the directions and purposes of his will.³ Their duties correspond to those of administrator in the first two points, unless there be a different provision in the will in regard to turning the estate into money. Their other duties vary according to the will of the testator. *At common law*, an executor could appoint an executor to carry out the provisions of the will of which he was executor. This is now changed by statute in most States. An *administrator* had no such power.⁴

An administrator or executor *with will annexed*, is a person *appointed by the court* to act as executor of a will when the testator has failed to appoint one.⁵

An administrator *de bonis non* is an administrator appointed to fulfil the duties of an administrator *who has died*, leaving the estate wholly or partially unsettled.⁶

¹ 2 Kent Comm. 409.

² Id. 415-426.

³ 1 Williams Ex. 266.

⁴ 2 Bl. Comm. 506.

⁵ 1 Williams Ex. 527.

⁶ Id.

An executor *de son tort* is one who, *without authority*, undertakes to act as executor. He is liable for any injury or loss which may occur to the property while he is so acting.¹

An administrator derives all his authority from the court, while an executor derives his authority *primarily from the will*, and it arises, not on the probate of the will, but at the testator's death.²

The descent of real property is governed by the *lex loci rei sitæ* (law of the place where the property is situated). Thus, if A dies in Boston, leaving real property in Chicago, its descent is regulated by the laws of Illinois.

The descent of personal property is governed by the *lex domicilii* (law of the domicile).³ By domicile is meant a person's *legal* residence. Thus, if A, whose home is in Boston, dies in Chicago, leaving personal property in New York, its descent is regulated by the laws of Massachusetts.

3. Title to personal property arising from the ACT OF THE PARTIES, may be *by gift* or *by contract*.

Gifts are of two kinds, *gifts inter vivos*, and *gifts causa mortis*.

Gifts *inter vivos* go into absolute and immediate effect. *Delivery* is essential to their validity. Actual delivery is necessary when such delivery is possible. If the thing given be a chose in action, there must be an assignment unless, as in the case of a promissory note payable to bearer, the title passes by delivery. A gift perfected by delivery and acceptance is irrevocable unless it be⁴

a. Prejudicial to creditors. The general rule is that gifts or settlements made by a debtor are fraudulent and can be set aside by the creditors. Gifts or settle-

¹ Williams Ex. 296 *et seq.*

³ 2 Kent Comm. 429 *et seq.*

² Id. 337 *et seq.*

⁴ 2 Kent Comm. 440.

ments made by a person who is free from debt at the time, but who afterwards becomes indebted, are valid, unless made with the intention of defrauding future creditors.¹

b. Unless the donor was under *some legal incapacity*, as infancy.

c. Unless the gift was induced by *intimidation* or *fraud*.

Gifts *causa mortis* are gifts made in apprehension of death. They are *revocable* by the donor in event of his recovery. The rule in regard to delivery is the same as in gifts *inter vivos*. *Symbolical delivery* may be good when no other delivery is, under the circumstances, possible, as the delivery of the key of a room containing furniture.² At common law it was a doubtful question whether bonds, bills of exchange, promissory notes, and other choses in action could be the subjects of a gift *causa mortis*, but the question is well settled in the affirmative in this country.³

¹ 2 Kent. Comm. 440.

² Id. 444-447 ; 2 Schouler Per. P. §§ 159, 162.

³ Id. 447 ; Id. § 147.

CHAPTER XVIII.

CONTRACTS—GENERAL PRINCIPLES, PARTIES, ETC.¹

A contract is an agreement between two or more persons, upon a sufficient consideration, to do, or not to do, a particular thing.¹

Contracts may be divided into

1. Contracts *under seal*, called specialties, and
2. Contracts *not under seal*, called simple contracts.

Contracts may be further divided into

1. *Parol contracts*, or those made orally, and
2. *Written contracts*, or those expressed and contained in some writing.

Contracts may also be divided into

1. *Express*, or those formed by direct act of the parties, and

2. *Implied*, or those which are presumed by the law to exist from the *relations* of the parties. Implied contracts are of two kinds. (a) Those implied *in fact*. Thus, if A orders and receives goods from B, nothing being said about the price, the facts warrant the inference of an agreement on the part of A to pay B reasonable price. That is, the *conduct* of the parties proves the contract, while in express contracts the contract is proved by their *language*.

(b). Contracts implied *in law*. See *Quasi-Contracts*.

There are four essentials of every good contract.

1. *Parties able to contract.*
2. *A sufficient consideration.*
3. *Parties willing to contract.*

¹ 2 Bl. Comm. 442 ; *Sturges v. Crowninshield*, 4 Wheat. 197.

4. *An actual meeting of the minds* (Assentio mentium).

The following parties are unable to form a *binding* contract :

(a) *Infants*, (b) *married women*, (c) *idiots* and *lunatics*.

A distinction is to be observed between *void* and *voidable* contracts. The former are *incapable of ratification*; can *never* be made the subject of an action at law.

The latter are capable of ratification, and *when so ratified* are binding. The contracts of an infant are voidable.¹ If ratified by him in an unmistakable manner, upon becoming of age, they are binding. The following contracts of infants are, however, binding.

(1). Contracts for *necessaries*.²

(2). Contracts for necessities *furnished a wife*.³

The infant is not, however, liable for necessities furnished to his intended wife in preparation for marriage.

As a general rule, at common law, the contracts of a married woman were void.⁴ If, however, a separate estate had been settled on her, she was in equity regarded as a feme sole with regard to that, and contracts made with direct reference to such an estate or for its benefit were binding.⁵ A deed made by a wife was absolutely *void*, though a deed made to a wife became valid upon ratification by the husband.⁶ The statutes of most States have entirely altered the common law, and, with limitations varying with the different States, marriage does not affect her ability to contract.

The contracts of *idiots* are *void*, as there is no capac-

¹ Met. Contr. 45; 1 Par. Contr. *294.

² 2 Par. Contr. *296.

³ Id.; 1 Chitty Contr. 197.

⁴ 1 Par. Contr. *345.

⁵ 2 Kent Comm. 164.

⁶ 2 Bl. Comm. 292.

ity to assent. A contract made during *lunacy* can be ratified, if the lunatic is restored to mental soundness.¹

Parties must be not only able, but WILLING TO CONTRACT. Contracts made under any form of illegal duress are voidable. A contract made by a person legally imprisoned, for the purpose of securing his release, is binding.² Contracts made in a state of *intoxication* such as to deprive the person of the ordinary use of his faculties are *voidable*.³

No contract can be VALID WITHOUT A SUFFICIENT CONSIDERATION.

Considerations are of two kinds, *good* and *valuable*.

1. A valuable consideration is one that is a benefit to the promisor, or an injury to the promisee.

2. A good consideration is love or natural affection.⁴

In order to bind *third parties*, the consideration must be valuable. Contracts with good considerations are binding only as between the parties.⁵ *Marriage* is a valuable consideration,—*i. e.*, a contract made in consideration of marriage is binding as to third parties.⁶

In the case of contracts *under seal*, and of *negotiable instruments* in the hands of a third party, the law *implies* a consideration, whether there be actually a consideration or not. In the case of sealed contracts, the law presumes a consideration only as between *parties* and their *privies*, not as regards third parties.⁷

There must be an actual agreement of the parties, an actual *meeting of the minds*; otherwise there is no contract. In the case of contracts *made by mail*, the

¹ See 1 Chitty Contr. 187; 1 Par. Contr. *383.

² 2 Kent Comm. 453; Met. Contr. 26 *et seq.*

³ 2 Kent Comm. 451, 454; 1 Chitty Contr. 192.

⁴ 2 Kent Comm. 464, 465; 1 Chitty Contr. 27.

⁵ 1 Par. Contr. *432.

⁶ Id. *431, and cases cited.

⁷ 1 Par. Contr. *427; 2 Kent. Comm. 465; Walker Am. Law 414.

general rule is that the assent of a party making a proposition by letter is supposed to continue until the other party has received the letter.¹ Thus, if A in New York makes by letter an offer of certain goods at a certain price to B, in San Francisco, A's consent is presumed to continue until the letter has reached B, and if B accepts and signifies his acceptance by a letter, the contract is completed upon the mailing of the letter. A subsequent retraction on the part of A would not affect the validity of the contract.

It is not necessary that the consideration be *adequate* in value. Any benefit to the promisor, however slight, if of any legal value, and any damage, inconvenience, or loss to the promisee, are sufficient to support the contract.²

An executed consideration will not support a subsequent promise, unless the consideration were executed at the *request* of the promisor, either express or implied. Thus, if A voluntarily, without any request on B's part, gives to B one hundred dollars, a subsequent promise by B to repay A will be void, there being no consideration for the promise. But if B had *asked* A to give him one hundred dollars, a subsequent promise of repayment on the part of B would be binding.

There are three cases, however, in which, in order to support an executed consideration, the request is *implied*, if it was not made expressly.³

1. Where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable, as when A, a surety, who has been damnified, brings an action to recover indemnity from his principal B. Here the law presumes a request from B to A to pay the amount, and a promise from B to reimburse A.

¹ 1 Par. Contr. *483.

² Met. Contr. 191.

³ 1 Chitty Contr. 69 *et seq.*

2. Where the defendant has adopted and enjoyed the benefit of the consideration. Thus, if A, without the authority or request of B, should make a wagon for the latter and leave it on his premises, and B should use the wagon, the law would presume both a request from B to A to build the wagon, and a promise to pay for it. Upon this principle depends the right of a publisher to recover for publications sent and not returned by the person to whom they were sent.

3. When the plaintiff voluntarily does that to which the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises to reimburse the plaintiff, thus if A pays a debt owed by B, a promise by B to recompense A would support an action against B.

The FOLLOWING FOUR CLASSES OF CONTRACTS ARE VOID : *immoral, illegal, impolitic, fraudulent.*

a. Immoral contracts are such as contravene the well-established principles of morality, as an agreement in consideration of future illicit cohabitation.¹

b. Illegal contracts include immoral contracts and all other contracts which tend to any violation of the law of the land, as a contract for the violation of revenue laws, or a promissory note given for a gambling consideration.²

c. Impolitic contracts are such as contravene sound public policy, as *marriage brocage contracts*, contracts in *general restraint* of trade; contracts in *general restraint* of marriage.

Marriage brocage contracts are agreements to pay third persons for procuring a marriage, through their influence with one of the parties to the match.³

Contracts in general restraint of marriage are void ; otherwise, with contracts in *partial restraint*. Also,

¹ Walker Am. Law 455 ; 2 Chitty Contr. 979.

² See 2 Chitty Contr. 971 *et seq.*

³ Id. 988.

legacies on condition that the legatee does not marry, are construed as unconditional legacies.¹

Contracts in general restraint of trade, with no limits to the space or time within which the trade or occupation is not to be exercised, *are void*. Also any *unnecessary* or *unreasonable* restraint, though with space or time limits, is void. Thus, it has been held that a contract not to engage in the teaching of French in the State of Rhode Island is void, in that a general prohibition was not essential to the protection of the plaintiff, nor reasonable for him to ask.²

d. All contracts tainted with any species of *fraud* *are void*. The principles governing fraud will be stated under Equity.

The *lex loci contractus* (law of the place of the contract) controls the *nature, construction, and validity* of the contract. As a rule, contracts valid *in the place where they are made, are valid everywhere*.³ If, however, a contract made under one government is to be performed under another, and the parties had in view the laws of the second government in regard to the execution of the contract, the *lex loci solutionis* (law of the place where the contract is to be executed) prevails. Thus, the days of grace allowed upon bills of exchange are computed according to the law of the place in which it is to be paid, not of the place where it is drawn.⁴

The *lex fori* (law of the forum, or of the place where an action is brought) governs and controls the *remedy* to be pursued upon breach of contract. It has been decided that the statute of limitations is a part of the *lex fori*.⁵ Thus, if an action is brought upon a con-

¹ Met. Contr. 267 ; 1 Story Eq. Juris. § 280 *et seq.*

² 2 Par. Contr. *748 *et seq.* ; Herreshoff *v.* Boutineau, 17 R. I. 3.

³ 2 Kent Comm. *455.

⁴ Id. *459 ; Pomeroy *v.* Ainsworth, 22 Barb. 118.

⁵ Id. *462 ; 2 Par. Contr. *591.

tract, in a State where the period of the statute of limitations operating upon that species of contract is five years, and the contract was made in a State where six years is the statutory period within which an action can be brought, the law of the first State controls in this respect.

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CHAPTER XIX.

SALES.

I. A sale is a contract for the transfer of property from one person to another in consideration of some *price*, or recompense in value. When goods are given in exchange for goods, the transaction is called *barter*.¹

There are three points to be considered in every sale—the *thing sold*, the *price*, the *consent* of the contracting parties.²

1. The thing sold must have an *actual* or *possible* existence, be *specific*, or identified, and capable of *delivery*. If A sells a house to B, and at the time of the sale the house had been burned, unknown to the parties, the sale is void, provided the house and not the land was the inducement to the contract. In case the vendor is unable to give a good title to the whole of the property sold, whether it be land or chattels, the rule is, that if the defect of title is so great as to render the thing sold unfit for the use intended and not within the inducement to the purchase, the purchaser is not held to the contract, but is at liberty to rescind it.³

2. The PRICE must be *real*, and not merely nominal, and must be *fixed*, or capable of being ascertained by the method prescribed in the contract.⁴

3. For mutual consent see *page* 91.

¹ 2 Bl. Comm. 446 ; Benj. Sales § 2.

² 2 Kent Comm. 468 ; see Benj. Sales § 1.

³ 2 Kent Comm. 468, 475.

⁴ Id. 476 ; see Benj. Sales §§ 85 *et seq.*

Warranties are of two kinds, *express* and *implied*. The only implied warranties which are generally accepted as such are those of *title*, that when a sale is made by *sample* the bulk of the goods *corresponds* in quality to that of the sample, and that when goods are ordered by description they should correspond to the description of the goods ordered. The mere expression of judgment or opinion does not amount to a warranty.¹

Defects are of two kinds, *latent* and *patent*. A latent defect is one which is not evident upon examination, and which only the use of and experience with the article can bring to light.

A patent defect is one that is apparent upon examination. The maxim *caveat emptor* (let the purchaser beware or be on his guard) applies to *patent* defects, and to such latent defects as are *mutually unknown*, but not to defects known to the vendor only. These must be made known by the vendor to the vendee.²

In case of a breach of warranty the vendee has two remedies. He may return the property and sue to recover the purchase-money, or he may keep the property and sue to recover the difference between the actual value of the property and the purchase-money.³

An action lies by the vendee *against a third party*, who, by *false representations* in regard to the thing sold, has induced the vendee to buy. Also, an action lies by the vendor against a third party who has induced him to give credit to the vendee by false representations, resulting in loss to the vendor.⁴

Delivery.—When the bargain is completed and

¹ 2 Kent Comm. 473 *et seq.* 486 ; Benj. Sales §§ 600, 627, 645, 648.

² Id. 482 *et seq.*; Id. §§ 611, 616. So far as the writer knows, the rule of *caveat emptor* has not been formulated in precisely this language, but it is believed to be deducible from the authorities, including others than those cited.

³ 2 Kent Comm. 480.

⁴ Id. 488 *et seq.*

everything that the vendor has to do with the goods has been done, the contract of sale becomes absolute and *delivery is not necessary as between the parties*, to pass the title.¹

The vendee is entitled to the goods upon payment of the price. If sold upon *credit*, he is entitled to them at once. When actual delivery is impossible, as in the case of logs in a river, *symbolical delivery* is sufficient. Delivery of goods to or by an agent is equivalent to delivery to or by a principal.²

Place of delivery.—If no place of delivery is specified in the contract, the goods are to be delivered where they are at the time of the sale.³

The statute of frauds, designed for the prevention of frauds and perjury, was passed in 29 Chas. II. (1677). It enumerates certain classes of contracts, which must be in writing, in order to be made the subject of an action, and Sec. 17, Chap. III., which has been substantially adopted in this country, provides that no contract for the sale of goods for the price of ten pounds or upwards shall be good unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized.

The statute of frauds as existing in the State where the student is examined, should be carefully learned by him, and an examination of the leading decisions under each section made.

The statements made in the section quoted in regard to delivery apply to the delivery *essential* to take a con-

¹ 2 Bl. Comm. 448 ; 2 Kent Comm. 492.

² Id. 492, 493, 499, 500 ; Benj. Sales §§ 677, 696.

³ 2 Kent Comm. 505, and cases cited.

tract out of the *statute of frauds*. A partial delivery is sufficient for this purpose.¹ The payment of earnest money does not entitle the vendee to possession; it merely takes the contract out of the statute.²

The property does not pass to the vendee until the articles have been separated from the common stock, and are ready for delivery.³ Thus, if A buys of B a certain amount of cloth, and pays for it, and before the cloth has been set apart or cut from the rest, the whole is destroyed, the loss falls on B, and A can recover the amount paid to B. The contrary would be true if the cloth had been separated from the mass and prepared for delivery.

FRAUD AS AFFECTING SALES.

As a rule, all contracts tainted with fraud can be set aside. In all cases of sales the contract must be *bona fide*, and upon a valuable consideration. In case a vendee procures goods with no intention of paying therefor, the vendor can treat the sale as void and replevy the goods.⁴

In the case of a sale accompanied by an agreement that *the vendor shall remain in possession* of the thing sold, two rules exist.

1. That such retention of possession gives rise to a *conclusive presumption* of fraud.

2. That while such retention is *evidence of fraud*, it is not conclusive evidence, but is capable of being rebutted.⁵

Stoppage in transitu is the right which the vendor, who sells goods on credit, has to resume the pos-

¹ *Mills v. Hunt*, 20 Wend. 431.

² 2 Kent Comm. 496.

³ *Id.* For review and classification of cases, see Benj. Sales § 334, note, 4th Am. Ed.

⁴ Benj. Sales § 423; 2 Kent Comm. 512; Benj. Sales § 440, note, 4th Am. Ed.; *Id.* for effect of insolvency.

⁵ See 2 Kent Comm. 515 *et seq.*

session of the goods while in the hands of a middle-man or carrier, *in transit* to the vendee, on the latter's *becoming insolvent*.

The exercise of this right does not rescind the contract, and the assignee of the vendee is entitled to receive the goods from the vendor, on tender of the price.¹

The vendor can assert this right as against any *general lien* that the middle-man may have against the vendee, but not as against the *special lien* which he has for carrying the particular thing in question.²

The right can be defeated in two ways.

a. By *delivery* to the vendee or his agent; but the goods must have arrived at their actual destination. The test is whether the goods have arrived at a place where they are under the direction and control of the vendee or his agents.³

b. By the vendor's having given to the vendee *instruments sufficient to transfer title* to the property, as bills of lading, if the vendee, on the strength of these documents, sells the property.⁴ Thus, A ships goods to B, and sends the bill of lading by mail, B indorses it to C, who purchases the goods in good faith. A's right of stoppage in transitu is gone as against C.

¹ 2 Kent Comm. 542.

² Id.; 3 Par. Contr. *242.

³ Id. 544 *et seq.*; 1 Par. Contr. *601 *et seq.* ⁴ Id. 548; Id. *606.

CHAPTER XX.

BAILMENTS.

Bailment is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee, as soon as the purpose of the bailment shall have been answered.¹

There are five kinds of bailment: *depositum, mandatum, commodatum, pignus, locatio*.

I. **Depositum** is a bailment of goods to be kept by the bailee for the bailor, and restored on demand, *without recompense*.² The consideration is *the disadvantage* to the bailor arising from being out of possession of his property.³ The bailee is to keep the goods with reasonable care, and is *liable* only for *gross neglect*, or the want of care which every sensible man, under the circumstances, would take of his own property.⁴

There are three cases in which the responsibility of the bailee is increased, and he is liable for *ordinary neglect*.⁵

1. When he *specially promises* to keep the goods safely.

2. When he *voluntarily* and *without request*, volunteers to keep the goods of another.

3. When the bailee receives compensation. This is not strictly an instance of deposit, but it differs only in

¹ 2 Bl. Comm. 451 ; Trunick v. Smith, 63 Pa. St. 18, 23.

² 2 Kent Comm. 559 ; Story Bailm. § 4.

³ 2 Par. Contr. *99 *et seq.*

⁴ Story Bailm. §§ 62, 64 ; 2 Kent Comm. 559.

⁵ Id. 565.

the nature of the consideration. The ordinary instance is that of warehousemen.

II. **Mandatum** is when one undertakes, without recompense, to *do* some act for another in respect to the thing bailed.¹ Where one merely undertakes to carry an article from one place to another, he is liable only for gross neglect. When, however, he undertakes to do some *work* relating to it, he must use a degree of care *suitable* to the work, and *adequate* to its performance.² The mandatary is not liable for *non-feasance*, that is, for a total omission to do the promised act in regard to the thing bailed; but when once he has started to do it, he is liable for *misfeasance*, that is, the improper doing of the thing promised to be done.³

III. **Commodatum** is the bailment or loan of an article for a certain time, to be used by the borrower *without paying* for its use.⁴ Here, the bailee is held to the *highest* degree of care, and is liable for *slight* negligence.⁵

The ordinary expenses attendant on the thing must be borne by the borrower; the extraordinary expenses, or those arising from the inherent defects of the thing, by the lender.⁶

IV. **Pignus**, or PLEDGE, is the bailment, or delivery of goods by debtor to creditor, to be kept till the debt is discharged.⁷ In this case the debtor is called the *pawnor* and the creditor the *pawnee*. The pawnee is bound to take *ordinary* care of the thing pawned, and is liable for ordinary neglect.⁸ In case any *profit* arises to the pawnee, while in possession of the pawn, he *must account* for the same to the pawnor.⁹

¹ See Story Bailm. § 137; Jones on Bailm. 117.

² 2 Kent Comm. 569; Coggs v. Bernard, 2 Ld. Raym. 909.

³ Id.; Story Bailm. § 165.

⁴ Jones Bailm. 118, 217; 2 Kent. Comm. 573.

⁵ Story Bailm. § 237.

⁶ 2 Kent Comm. 577.

⁷ Jones Bailm. 117.

⁸ Story Bailm. § 332.

⁹ Id. § 343.

If the pawn is not redeemed at the specified time, the pawnee can pursue one of three courses.

1. He can *proceed directly* against the pawnor, without looking to the pawn.

2. He can bring a *bill in equity* and secure a sale of the property by order of court.

3. He can proceed to sell the property *himself* upon giving *due notice* to the pawnor.¹

A pledge differs from a *mortgage of personal property* in two particulars.

1. The pawnee has only a *special property* in the thing pawned, the general property being in the pawnor; while the mortgagee has the general property, the mortgagor having merely a right to redeem.

2. The pawnee has *possession* of the pledge; otherwise with the mortgagee.²

V. *Locatio* (letting) is a contract by which the use of a thing, or labor or services about it, are stipulated to be given for a reasonable compensation, express or implied. This bailment is of three kinds.³

A. *Locatio rei* (letting of the thing), by which the hirer, for a compensation, gains the temporary use of the thing. The hirer is bound to use *ordinary* care, and is liable for ordinary neglect. He has a special property in the thing hired. In case of loss or injury, the bailor must prove want of due care on the part of the bailee.⁴ The bailee can use the property only for *the purpose for which it was hired*.⁵ Thus, if A hires a horse with which to go to B, and he goes to C instead, he is liable in trover for conversion, and for any damage arising from going to C.

B. *Locatio operis faciendi* (letting of work to be done) is where work and labor are to be bestowed on the

¹ 2 Kent Comm. 582.

² Story Bailm. § 287.

³ 2 Kent Comm. 586.

⁴ Id. 587; Story Bailm. §§ 405, 410.

⁵ Id. § 413.

thing delivered for a pecuniary recompense. The bailee is liable for *ordinary* neglect, and must apply a degree of skill *suitable* to his undertaking.¹

In the case of an *inn-keeper* (treated by Mr. Story under *Locatio custodiæ*), the liability is greater than in the case of other bailees of this class. He is held to the highest degree of responsibility. He is *an insurer* of the goods of his guest, and he can only limit his liability by express *agreement* or *notice*. Whether the notice is a reasonable and valid one is to be determined by the courts. Thus, it is held that the ordinary regulation requiring guests to deposit valuables in the hotel safe is a reasonable one, and guests suffering loss from a neglect to do so, have no remedy against the inn-keeper.²

This high degree of liability attaches to an inn-keeper only, not to a *lodging* or *boarding-house* keeper. In the latter instances, the landlord makes a separate contract with each guest, while an inn is a house, the owner of which holds out that he will receive all travellers who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received.³

The local statutes should be consulted by the student on this subject.

C. Locatio operis faciendi mercium vehendarum (the letting of the work of carrying goods) is a bailment by which one person undertakes to carry goods from one place to another for a pecuniary recompense. The contract has special relation to common carriers.

A **common carrier** is one who undertakes for hire to transport the goods of such as choose to employ him from place to place.⁴ The liability is of the high-

¹ Story Bailm. §§ 429, 431.

² See 2 Par. Contr. *146, *149, note, and cases cited, 8th Ed.; 2 Kent Comm. 594.

³ 2 Par. Contr. *151.

⁴ *Dwight v. Brewster*, 1 Pick. 50.

est order. Common carriers are responsible for *all injuries* to, or losses of goods, except those arising from the *act of God*, or *the public enemy*. By the act of God is meant any agency operating *without the aid or interference of man*.¹ By the public enemy is meant those persons with whom *the State or Nation is at war*.² The term does not include a mob; therefore common carriers are liable for injuries to property which they hold as common carriers, arising from such a source.

The liability of a common carrier BEGINS when the goods *come into his custody*, as by delivery at the freight-house of a railroad.³

There are TWO RULES which have been adopted by the courts TO DETERMINE WHEN THE LIABILITY as a common carrier ENDS:

1. It is held to end when the goods have *reached their destination* and transportation has ceased. Thus, if goods are shipped from the city of A to the city of B, the liability as common carrier ends when they reach B, and are stored in the freight-house, or a reasonably safe place.⁴

2. The liability as common carrier continues not only until the goods have reached their destination, but until the consignee has had *a reasonable time* in which to *remove* them,⁵ and there is some authority for holding that the carrier is bound to give *notice* to the consignee of their arrival.⁶ If the goods are not re-

¹ 2 Par. Contr. *159, *160.

² Id. *163.

³ Id. *176.

⁴ Rice v. Railroad Co., 98 Mass. 212; Bausemer v. Railroad Co., 25 Md. 434; Richards v. Railroad Co., 20 Ill. 404.

⁵ Moses v. Railroad Co., 32 N. H. 523; Mills v. Railroad Co., 45 N. Y. 622.

⁶ Herman v. Goodrich, 21 Wis. 536; McDonald v. Railroad Co., 34 N. Y. 497. Such is apparently the English rule. Mitchell v. Railroad Co., 10 L. R. Q. B. 256; Railroad Co. v. Swaffield, 9 L. R. Ex. 132.

moved within a reasonable time, the carrier's liability becomes merely that of a *warehouseman*.¹

Liens.—The common carrier has a lien on the goods for his freight. A lien is the right to retain possession of personal property for the satisfaction of some charge in relation thereto.² Liens are of two kinds, *general* and *special*.

They arise in three ways:³

1. By *express contract*.
2. By *general course of dealing*.
3. From the *particular circumstances* of the dealing between parties.

A general lien is one which can be enforced on goods in possession for the satisfaction of the *balance of an account*.

A special lien is one which can be enforced on goods in possession only for charges in relation to those *particular goods*. Special liens are favored, general liens not.⁴ A common carrier has a *special* lien and can probably create a general lien by express contract.⁵

✓ **Liability of the carrier beyond his own route.**—

The general rule is, that no responsibility as a carrier is cast upon the carrier beyond his own route, unless the usage of business, or of the carrier, or his conduct or language, shows that he takes the parcel as carrier for the whole route. The receipt of payment for the whole route, is strong evidence of such an undertaking.⁶

Common carriers of passengers.—The common carrier is liable for injuries to passengers arising from the *slightest* negligence on its part.⁷ As a rule, *contributory negligence* on the part of the *passenger* releases the carrier from liability.⁸ As in the case of

¹ 2 Par. Contr. *197.

² Bouv. Law Dict. sub. Lien.

³ 2 Kent Comm. 634.

⁴ Id.

⁵ Rorer, Railroads, 1311; Jones, Liens § 265.

⁶ 2 Par. Contr. *213.

⁷ Id. 219.

⁸ Marble v. Ross, 124 Mass. 44.

goods, so in that of passengers, the common carrier is bound to receive all who in a suitable condition offer themselves. The carrier's liability to a passenger *begins* when the latter *enters the premises* of the carrier with the intention of taking passage, and ceases when he has left the premises at the end of the journey.¹

The carrier is liable for injury to *baggage*, as in the case of other goods, provided the baggage consists of such things as are essential to the personal needs of the passenger. The fare paid by the passenger includes payment for the transportation of personal necessities as baggage. Whether an article may properly be carried as baggage is a question of fact, to be determined by the circumstances of each case.

When baggage reaches its destination, the rules governing the carrier's liability are identical with those prevailing in the case of other goods.²

Regulation of common-law liability by contract or notice.—The carrier can by contract, or by notice equivalent to contract, exempt himself from any liability for damage not caused by his own negligence or default.

The carrier cannot by contract, or notice equivalent thereto, protect himself from liability for the consequences of a wilful default or tort.

The weight of authority is against the proposition that the carrier can exempt himself from all liability for the consequences of his own negligence.³

¹ 2 Wood, Railroads, 1205, 1218.

² 2 Par. Contr. *199; Schouler Bailm. §§ 667, 672, 692.

³ 2 Par. Contr. *250.

CHAPTER XXI.

AGENCY—GENERAL CLASSES OF AGENTS.

Agency is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business, and by which the other assumes to do the business.¹

Agents are of two general kinds :

General agents and *special agents*.

1. A general agent is one empowered to transact *all the business* of his principal of a particular kind.

2. A special agent is one empowered to do only some *particular act* for his principal.² As a rule, the acts of an agent bind the principal when done *within the scope of his authority*. The acts of a general agent will bind the principal if they are within the general scope of the authority of agents of that class, though they may be *contrary* to the *express instructions* of the principal. The general agent derives his power both from his principal and from *the usage* which invests agents of his class with certain powers. A special agent, on the contrary, derives *all* his power from his principal, and any act done contrary to the instructions of his principal is *voidable* as regards the principal. The person dealing with a special agent must look to his authority as delegated by the principal ; otherwise, he acts at his peril.³

Thus, if A sends flour to B, a flour factor, with instructions to sell at \$6.00 a barrel, and he sells at

¹ 2 Kent Comm. 614.

² 1 Par. Contr. *41.

³ 2 Kent Comm. *620 *et seq.* ; 1 Par. Contr. *42.

\$5.00; this sale binds A, because it is within the general scope of a factor's authority to sell the goods sent by a principal. But if A sends flour to B, a horse-dealer, with instructions to sell at \$6.00, and he sells at \$5.00, the sale is voidable, because, being a special agent for the sale of the flour, he derives all his power from the instructions of his principal, and any act contrary to them is voidable by the latter. The purchaser in this case must ask for evidence of the agent's authority to sell at the proposed price, if he wishes to act with security. Neither class of agents ordinarily has power to appoint sub-agents.¹

How created.—The contract of agency may be created in three ways: *by parol, by writing, by implication* from the acts and relations of the parties. Authority to make an *instrument under seal* must, however, be itself given by an instrument under seal.² An act of the agent, though in excess of his authority, may be *ratified* by the principal, and it is then as binding as though made originally with authority.

When agent is personally liable.—When the agent acts within the scope of his authority his acts bind the principal, and no liability is incurred by the agent. The agent, however, becomes personally liable in four cases.³

1. *When the principal is unknown*, or the agent holds himself out as the principal. In this case, the real principal can take advantage of the acts of his agent, and can call upon the third party to carry out contracts made with the agent on the supposition that he was the principal. In a suit brought by an undisclosed principal against a third party, the latter can *set off* any claim which he may have against the *agent* with whom he dealt, supposing him to be the principal.⁴

¹ 1 Par. Contr. *85; 2 Kent Comm. 633.

² Id. 614, 615.

³ 2 Kent. Comm. 629 *et seq.*; 1 Par. Contr. *64 *et seq.*

⁴ 2 Kent Comm. 633.

2. *When there is no responsible principal.*

3. *When the agent makes an undertaking in his own name*, as if A, an agent, should make a note reading "I promise to pay" and should sign it A, agent for B.

4. *When the agent exceeds his powers.*

There is a distinction between *public* and *private* agents on the point of personal responsibility. If an agent, on behalf of the government, makes a contract and binds himself as such, he is not personally bound, though the terms of the contract be such as would bind him if acting as a private agent.¹

Agency, how terminated.—Agency may be terminated in six ways.²

1. By the death of the agent.

2. By the death of the principal.

3. By the limitation of the agency to a particular time.

4. By the completion of the business for which the agent was appointed.

5. By revocation of the power by the principal. The principal can do this whenever he wishes, except in the case of an agency *coupled with an interest* in the business of the agency.³

6. By a change in the state or condition of the principal, as by insolvency.

Classes of general agents. There are four chief classes of general agents: *attorneys, auctioneers, brokers, and factors.*

1. Attorneys have a general lien upon the papers of their clients, and a special lien on the funds recovered in any particular case⁴. They have no power to settle claims except by the express authority of their clients.⁵

For relations between attorney and client, see Equity.

¹ 2 Kent Comm. 633.

² Id. 643 *et seq.*

³ 1 Par. Contr. *69.

⁴ 2 Kent Comm. 640, 641.

⁵ Mechem Agen. § 813, and cases cited.

2. An auctioneer in possession of goods has an interest coupled with the possession. He has a special property in the goods, and a special lien on them for the charges of the sale and his commission. The auctioneer is the agent of both buyer and seller, and his memorandum of sale is sufficient to take a sale out of the statute of frauds. The contract is completed when the hammer falls, this act of the auctioneer as agent of both parties completing it.¹

The general rule in regard to *puffers*, or persons employed by the vendor to enhance the price of goods sold at auction, is that the employment of such bidders voids the sale. The proper method is to announce, before the opening of the sale, the minimum price which will be accepted.²

3. **Brokers** are persons employed to make bargains between their principals and third parties. When a bargain is concluded it is customary for the broker to give the vendee a "*bought note*," or a brief statement of the property sold, price, etc., and to the vendor a "*sold note*" containing substantially the same matter as the "*bought note*." If these notes agree they form indisputable evidence of the contract. If they conflict, parol evidence can be introduced to show the real contract.³

4. **Factors.**—The terms broker and factor are often used synonymously, but a factor differs from a broker in two respects.

a. He has the goods of his principal actually *in his possession*; the broker does not.

b. As a result the factor has a *general lien* on the goods as being in his possession.⁴ A factor can do all

¹ 2 Kent Comm. 537, 540; Mechem Agen. § 893.

² 2 Kent Comm. 538; 1 Par. Contr. *496.

³ 1 Par. Contr. *541, *542.

⁴ 1 Par. Contr. *91, *99. See Mechem Agen. § 927, 936a.

such acts in regard to the goods in his possession as are sanctioned by the general usages of trade. He can sell on credit, if such be the usage. He *cannot*, however, *pledge* the goods as security for his own debt, and any attempt to do so is null and void.¹ This rule is altered by statute in many States.

A factor acting under a *del credere* commission is one who, for an additional premium or commission, becomes liable to his principal when, in a sale on credit, the purchase-money becomes due. It is an original contract and is not within the statute of frauds. Under this contract the factor is commonly regarded as becoming a surety for the solvency of the vendee, and a guarantor of the payment of the price for which the goods were sold.²

Master and Servant.—The general rules of agency govern in respect to master and servant.

The master is responsible for all acts of the servant done *within the scope of his authority*.³ If a servant buys goods for his master on credit contrary to his instructions, the master is bound if the servant had *previously* bought goods on credit without remonstrance from the master, and if the vendor had no notice of the master's instructions to his servant. A master is liable for *torts* committed by a servant when in the performance of his duty, as if a coachman employed in conveying his master from one place to another, negligently injure a traveller who is in no fault. The master is *not* liable for acts committed *out of* the course of his employment, nor for wilful trespasses.⁴

The master is justified in making an *assault* in defense of his servant, and a servant in defense of his master.⁵

¹ Mechem Agen. § 994.

² 1 Par. Contr. *91.

³ 2 Kent Comm. 259, Schouler Dom. Rel. § 489.

⁴ Id. §§ 490, 491.

⁵ 2 Kent Comm. 261.

A master is bound to use all reasonable care, diligence, and caution in providing for the safety of those in his employ, and in furnishing for their use sound, safe, and suitable tools and machinery; otherwise he is liable for any injury occurring to the employee through defects in the tools or machinery used, *provided* the employee is guilty of no *contributory negligence*.¹

An employee *cannot* recover from his employer for injuries resulting from the negligence of a *co-employee*. Co-employees are those who *directly co-operate* with each other in a particular business in the same line of employment, and whose usual duties bring them habitually together.

¹ See Wood on Mas. and Ser. §§ 329, 334, 345, 372.

CHAPTER XXII.

BILLS AND NOTES.

A **promissory note** is an unsealed promise in *writing* by one person to pay another person therein named, or to his *order* or to *bearer*, a specified sum of money *absolutely* and at all events.¹ There are thus six essentials of every promissory note.²

1. It must be *certain*—that is, there must be a clear promise to pay.

2. It must be payable *absolutely, unconditionally*, and at *all events*.

3. It must be payable in *money*.

4. It must be for a *certain* and *fixed amount* of money.

5. It must be payable at a *certain* time, or at a time which is capable of becoming certain. Thus a note payable on demand, or at the death of A, is a good note; while a note payable “as soon as the crop can be sold, or the money raised from any other source,” is not a promissory note.

6. It must be *delivered*.³

The following is a form for a promissory note largely in use:

¹ 1 Dan. Neg. Ins. § 28.

² See Id. § 30 *et seq.*; 3 Kent Comm. 75 *et seq.*; Story Prom. Notes § 24 *et seq.*

³ Story Prom. Notes § 56, n.

\$100

NEW YORK, N. Y., *Aug.* 8, 1890.

..... months after date, I (we) promise to pay to A
B. or order (or bearer) one hundred dollars, with inter-
est at %

Value received.

C. D.

Illustrations of possible indorsements on back of note.
(See Story Prom. Notes § 138.)

- | | |
|---|----------------------------|
| 1. A. B. | (Indorsement in blank.) |
| 2. Pay to the order of E.
F. | } Indorsement in full. |
| A. B. | |
| 3. Pay to the order of G.
H. | } Indorsement in full. |
| E. F. | |
| 4. Pay to the order of I.
J., without recourse. | } Qualified indorsement. |
| G. H. | |
| 5. Pay to the order of M.
N. if he be living when
the note becomes due. | } Conditional indorsement. |
| I. J. | |
| 6. Pay to the order of X.
Y. on account of M. N. | } Restrictive indorsement. |
| M. N. | |

Parties to a note.—Every note must have at least two parties, the *maker* or payor, as he is sometimes called, and the *payee*, or the party to whom or to whose order the note is payable. When a note is signed by two or more persons it is either *joint*, or *joint and several*. It is a joint note when written "*We promise to pay*" and signed by the parties. In case such a note

is not paid, all the makers must be joined in suit. A joint and several note is one written, "We *jointly* and *severally* promise to pay." In event of non-payment, the holder can sue the makers jointly or individually. In case one of several joint and several makers pays the whole amount, he can recover from the other makers their proportionate shares.¹

If the note be *payable to bearer*, title to it passes by mere delivery. If it be payable to order, when transferred it must be *indorsed* in order that the holder can bring suit directly in his own name against the prior parties to the note. No particular form is essential in indorsement. In substance it consists in the payee's *writing his name* on the back of the note,² as illustrated on page 115.

The indorsement of a note AMOUNTS TO A CONTRACT on the part of the indorser with and in favor of the indorsee and of every subsequent holder.³

1. That the *instrument* itself and the antecedent *signatures* thereon are *genuine*.

2. That he, the indorser, has a *good title* to the instrument.

3. That he is *competent* to bind himself as an indorser.

4. That the *maker* is competent to bind himself and *will pay the note* upon presentment when it is due.

5. That if, *when duly presented*, it is not paid by the maker, he, *the indorser*, will upon *due* and *reasonable notice* given him of the dishonor, *pay the same* to the indorsee or other holder.

Indorsements may be of five kinds—in blank, in full, restrictive, qualified, conditional.⁴

¹ Story Prom. Notes § 57; 1 Dan. Neg. Ins. § 94.

² Story Prom. Notes §§ 116, 117, 120, 121.

³ Id. § 135; 1 Dan. Neg. Ins. § 66a.

⁴ Story Prom. Notes §§ 38-149; 2 Par. Bills and Notes 18-22.

1. An indorsement *in blank* is when only the name of the indorser is written on the back of the note, no direction being given as to whose order the note is to be paid. Such an indorsement of a note *payable to order* gives it thereafter the force of a note *payable to bearer*, and title can thenceforth be transferred by delivery. The last holder can fill in above the indorsement in blank, a direction to pay to the order of himself, and can then treat the blank indorsement as made to him, and the indorser in blank becomes liable as though he had originally directed the note to be paid to the order of the last holder. (See indorsement 1, page 115.)

2. An indorsement *in full* is when the name of the person in whose favor it is made is mentioned. (See Indorsements 2, 3, page 115.)

3. A *qualified* indorsement is one in which the indorser qualifies the duties and obligations of an indorser which he would otherwise incur under the general principles of the law. (See indorsement 4, page 115.) An indorsement *without recourse* relieves the indorser of responsibility in event of non-payment. It does not affect negotiability; it merely cuts off subsequent holders from any remedy against the indorser.

4. A *conditional* indorsement is one which involves some fact or event upon the occurrence of which the validity of the indorsement is ultimately to depend. (See indorsement 5, page 115.)

5. A *restrictive* indorsement is one in which the payment of the note is restricted to a *particular person*, or for a *particular purpose*, or is made in favor of a person who cannot make a transfer of the note to another. It thus restricts the negotiability of the note. (See indorsement 6, page 115.)

There is no limit to the number of indorsements which may be made on a promissory note. In case

the same note comes for a *second time* into the hands of the same holder with a number of indorsers and indorsees between the first and last appearance of his name on the note, he stands, with regard to the note, *as though it had never left his possession*; and, in event of dishonor, he can look to any indorsers *prior to the first appearance* of his name on the note, but *not* to any *subsequent* indorsers; this to avoid *circuity of action*.¹

When, *at the time a note is made*, a party writes his name on the back without specifying in what capacity or for what purpose, he has been regarded by the courts in three lights—as a *joint maker*, as a *guarantor*, as an *indorser*.²

In many States this matter is regulated by statute.

An *accommodation* indorser is one who indorses a note for the benefit of the payee, to enable him to negotiate it. With regard to subsequent holders, he does not differ from an indorser for value.³

Consideration.—A promissory note is presumed to be founded upon a valid and valuable consideration. Hence, in a suit between the original parties, or between an indorser and his immediate indorsee the plaintiff is not obliged to prove a consideration, but the burden of proof rests upon the defendant to prove the contrary.⁴

A promissory note is a contract; and, as between *immediate parties*, it would be void if the consideration were immoral, illegal, impolitic, or if it were tainted with fraud, extorted by duress, etc.⁵

But, with regard to *subsequent holders*, the rule is that a promissory note, *not overdue, in the hands of an innocent purchaser for value*, is valid as against all prior

¹ Story Prom. Notes § 151; see for explanation and limitation of the rule, 2 Par. Bills and Notes 30 *et seq.*

² 1 Dan. Neg. Ins. § 713; 1 Par. Contr. *250.

³ 2 Par. Bills and Notes 27.

⁴ Story Prom. Notes § 181.

⁵ Id. §§ 186, 189.

parties on the note, *regardless of the original consideration* as existing between maker and payee.¹ There are two important exceptions to this rule.

From public policy, all notes whose considerations are *usurious*, or which are given for *gambling* debts, are absolutely void in whatever hands they may be.² See local statutes on this subject.

The consideration of a promissory note may be inquired into in two cases.³

1. As between the *maker* and the *payee*.

2. As between an *indorser* and his *immediate indorsee*.

It cannot be inquired into as between⁴

1. An *innocent indorsee* for value, and any *prior indorser other than* his immediate indorser.

2. As between an *innocent holder* and the *maker*.

An *accommodation note* is one made without consideration for the benefit of the payee to enable him to negotiate it. Such a note does not differ from any other, so far as the rights of an innocent holder for value are concerned.⁵

In case of the note on page 115, the consideration could be inquired into in a suit between A B, and C D, or G H and I J, but not in a suit on the note between I J and C D, or I J and E F.

If, however, an innocent purchaser for value takes a note *after it is overdue*, he takes it as a dishonored note, and subject to *all the equities* existing between the maker and payee, or any indorser and his immediate indorsee. That is, if such a purchaser brings suit on the note against the maker or indorser, the maker or indorser can *set up any defense*, such as lack of consideration, which he could set up against a

¹ Story Prom. Notes §§ 191, 192; Tied. Comm. Paper § 279.

² Id. 192; 3 Kent Comm. 79.

³ 1 Dan. Neg. Ins. § 174.

⁴ Randolph Comm. Paper §§ 1885, 887; Tied. Comm. Paper § 154.

⁵ 3 Kent Comm. 86; see 1 Dan. Neg. Ins. § 790.

suit brought by the payee, or immediate indorsee; *provided* it is a defense arising from the transaction involving the note, and not from any independent transaction.¹

Thus, if M, the purchaser of an overdue note, should sue A, the maker, the latter could not set off against M a claim which he held against B, the payee, arising from an independent transaction, though such a claim could be set off in an action by B against A.

Presentment.—So far as the maker is concerned, a note may be presented for payment at any time within the period which will, under the statute of limitations, act as a bar to any claim under it. But, in order to bind the indorsers, it must be presented to the maker for payment *on the very day on which by law the note becomes due.*² Three causes only will constitute a sufficient excuse for failure to present for payment, and to give notice to indorsers in event of non-payment.³

1. *Inevitable accident.*

2. *Irresistible force*, such as war, or the forbidding of commercial intercourse with the maker's country.

3. *Unforeseen occurrences*, such as the prevalence of a malignant disease, which stops all business in the maker's place of abode.

If a note is made payable *on demand*, payment must be demanded within a *reasonable time.*⁴ Consult local statutes in regard to this.

A demand is *not necessary* prior to the bringing of suit on a demand note, unless so provided by statute. The *statute of limitations* runs against a demand note *from the day of its date*; ⁵ against a note payable *at*

¹ Story Prom. Notes § 178; 3 Kent Comm. 91; 1 Dan. Neg. Ins. § 744 *et seq.*

² Story Prom. Notes § 201.

³ See Id. §§ 205, 356; 1 Dan. Neg. Ins. § 478.

⁴ Story Prom. Notes § 207.

⁵ Id. § 29 n.

sight, only after *presentment*.¹ No days of grace are allowed on a demand note ; otherwise on a sight note.²

In computing the time at which a note payable in so many days after date is due, the day of date is excluded.³ Thus, a note dated August 8th, and payable twenty days after date (without grace), would become due on August 29th.

Days of grace are days of indulgence granted to the maker for the payment of a note. They are three in number, and the note becomes due and payable *on the last day* of grace. Days of grace are calculated *exclusive* of the day on which the note would otherwise be due.⁴ Thus, in the note on page 115, if it were payable three months after date, it would, without days of grace, be due on November 8th. November 9th would be the first day of grace, and November 11th the last, on which presentment should be made. Days of grace are counted consecutively *without any deduction* or allowance for intervening holidays or Sunday.⁵ If the last day of grace falls on Sunday, or a holiday, presentment should be made on the day preceding.

When a note becomes due it should be presented for payment within reasonable hours. What are reasonable hours is to be determined by the customs and usages of the place of payment. If a particular place of payment is specified in the note, it should be presented at that place. Failure to present at the place does not, however, relieve the maker from liability ; otherwise, with the indorsers.⁶

If the maker had *funds* at the appointed place, and the note is not presented at that place, the maker cannot be compelled to pay costs and damages in a suit on the note, and if the funds are at the appointed

¹ Randolph Comm. Paper § 1608.

² Id. § 211.

⁵ Id. § 219.

² Story Prom. Notes § 224.

⁴ Id. § 217.

⁶ Id. §§ 226, 227, 230.

place, as at a bank, and they have been lost by the failure of the bank, he is exonerated from any liability on the note.¹

In case no place of payment is specified in the note, it should be presented to the maker personally, or at his usual abode or place of business. Presentment should be made by the holder, or his duly authorized agent, and the demand for payment should be plain and unequivocal.²

Proceedings upon non-payment.—Upon the dishonor of a note, it is the duty of the holder to give *due notice* thereof to all prior parties on the note to whom he intends to look for payment. The notice must be given by the holder himself, or by a duly authorized agent. Notice by a party *without interest* in the note is *void*.³

Notice of dishonor should be given personally to the party to be bound, as indicated above, if he resides in the same town as the holder ; otherwise, notice by mail is sufficient. Notice by mail in any case is sufficient if received. When the notice of dishonor is given by mail, *it must be deposited* in the post-office *so as to leave* by some mail *on the day succeeding the day of dishonor*.⁴ Thus, if a note becomes due August 7th, and payment is refused, notice of dishonor must be mailed on August 8th, so that it may start on its way on that day. *Failure* to mail the notice within this time *releases all the indorsers*.

If the holder wishes to hold all the indorsers, he sends a notice to them all ; otherwise, only to those to whom he looks for payment. Each indorser, upon receipt of notice of dishonor, has the same time in which

¹ Story Prom. Notes §§ 227, 228. There is a conflict in this respect, however ; see Tied. Comm. Paper § 310.

² Id. §§ 235, 242.

³ Tied. Comm. Paper §§ 334-335 ; Story Prom. Notes § 301.

⁴ Id. §§ 337, 339 ; Id. §§ 312, 319 *et seq.*

to notify prior indorsers as the maker has, that is, practically one day.¹ Suppose A, B, C, and D are indorsers on a note falling due August 7th, and E, the holder, mails notice of dishonor to D on August 8th, D receives it on August 9th; he must then send notice to C not later than August 10th. B upon receipt of notice has until the day following in which to notify A. If the holder notifies *all the indorsers*, as A, B, C, D, and D pays the note, the notice given to the other indorsers by E *inures to D's benefit*, and he can look to them, or either of them, for reimbursement.² If E notifies D alone, and in due time D notifies C, C notifies B, and B notifies A; E can then look for payment to any of the indorsers, as A, since in case due notice is given, the first indorser will be ultimately liable.³

The holder must give his notice, in event of dishonor, on the day following, no matter how many indorsers there may be.⁴ Thus, E could not wait four days after dishonor and then give notice to the first indorser, A.

When the notice is placed *in the post-office*, the party placing it has done all in his power, and it is *immaterial*, so far as his rights are concerned, whether the party to whom it is directed *receive* it or not.⁵

As regards the *form* of the notice, no precise form of words is necessary, but it should contain⁶

1. A *true description* of the note.
2. An assertion of its due *presentation* and *dishonor*.
3. An assertion that the holder, or other person giving the notice, *looks to the party* to whom notice is given for *reimbursement*.

The same causes as operate to excuse failure to present for payment will excuse a failure to give due and regular notice of dishonor. (See page 120.)

¹ Story Prom. Notes § 331.

² Id. § 302.

³ Id. § 334.

⁴ Id. 332.

⁵ Randolph Comm. Paper § 1300.

⁶ Story Prom. Notes § 348.

In the following special cases, the indorser is bound to the holder, *without receiving notice of dishonor*.¹

1. When the note was given for the *accommodation* of the indorser only; as when A makes a note payable to B for the latter's accommodation, and the latter indorses and negotiates it.

2. An *original agreement* on the part of the indorser, made with the maker or other party, *at all events to pay the note* on maturity to the holder.

3. The *receiving of security* by an indorser from the maker or other party, to secure him against liability on the note.

4. An *original agreement* by the indorser *to dispense with notice*.

5. A *release of a prior indorser* by the holder releases all indorsers between the indorser released and the holder,² since otherwise they could look to the released indorser for indemnity, in case they were compelled to pay the note. Such a release does *not* affect indorsers *prior* to the released indorser.

6. Any *giving of time* by the holder to the maker, by a binding agreement upon a note's coming due, will release the indorsers.³

For the course to be pursued by the holder of a lost or destroyed note as against the maker or indorsers, see local statutes.

Promissory notes (non-negotiable).—A promissory note payable to a particular person, without containing any words of negotiability, may be *assigned*, and the purchaser can bring suit against the maker in the name of the assignee. If such a note is indorsed by the payee, the indorser incurs the ordinary liability of an indorser on a negotiable note, *so far as his immediate indorsee is concerned*, but there is *no privity* between him and

¹ Story Prom. Notes § 357.

² Id. § 423.

³ Id. § 413.

any *subsequent* holder of the note;¹ that is, each indorser and his immediate indorsee do not differ from the same parties to a negotiable note, but they have no privity with either prior or subsequent parties. The holder can, however, use the name of the payee in a suit against the maker.

A bill of exchange or draft is a written order or request by one person upon another to pay to some third party, or his order, or to bearer, a certain sum of money. The six essentials to a promissory note also apply to the case of a bill of exchange.

There are *three* parties to every bill: the *drawer*, who corresponds to the maker of a note; the *drawee*, or person to whom the bill is addressed, and who is requested to make the payment; the *payee*, or person in whose favor the bill is drawn.² The bill may be made payable on demand, or at sight, or so many days after sight, or on a day certain.

When a bill is payable at sight, or so many days after sight, the payee should present it to the drawee for acceptance within a reasonable time. What is a reasonable time depends upon the circumstances of each case, unless regulated by statute.³

When a bill is *accepted* by the drawee, he is called the *acceptor*, and becomes the party primarily liable. The indorsers on the bill stand in precisely the relation of indorsers on a note, while the *drawer* becomes a *surety*, and in event of non-payment by the acceptor, becomes liable to the holder of the bill.⁴ After acceptance, the acceptor can be released from liability in only two ways:⁵

1. By *payment*

2. By a *release* from the holder.

¹ Story Prom. Notes § 128; Tied. Comm. Paper §§ 242, 257b.

² 3 Kent Comm. 75.

³ 1 Par. Bills and Notes § 377; 3 Kent Comm. 83.

⁴ Id. 86.

⁵ Id.

Acceptance may be of two kinds :

1. *General*, or according to the terms of the bill.
2. *Special*, or one varying the terms of the bill in some particular. A special acceptance binds the acceptor, but the holder is not obliged to take a special acceptance. If he does so, it releases the drawer and indorsers from any liability on the bill.¹

Acceptance may be by *parol* or in *writing*. The common method is for the acceptor on presentation of the bill to write the word "accepted" with his signature on its face.² The drawee has a reasonable time in which to accept the bill after it has been presented. This is largely regulated by statute.

A *promise* to accept a bill, *made before* actual *acceptance*, amounts to an acceptance in favor of the person to whom the promise is made, and who took the bill on the strength of it.³

If, upon presentation, acceptance is refused, the holder should give the indorsers notice, the rules governing the notice being identical with those holding in case of notice to indorsers upon the dishonor of a note. If a third person, upon the refusal of the drawee to accept, intervenes and accepts the bill, it is called an acceptance *supra protest*.

A holder is not obliged to accept an acceptance *supra protest*, but *once accepted* the acceptor *supra protest* becomes primarily liable, and if he pays the bill has his remedy against the prior parties to the bill.⁴

Protest.—Bills of exchange may be divided into two classes :

1. *Domestic*, or those drawn and payable in the same country.

¹ 2 Randolph Comm. Paper § 621 ; 1 Dan. Neg. Ins. § 471.

² 3 Kent Comm. 84; 1 Par. Bills and Notes 231, 232.

³ Id. 84.

⁴ 3 Kent Comm. '87.

2. *Foreign*, or those drawn in one country and payable in another.

In the case of a foreign bill, presentment must be made by a *notary*, and protest must be made by him in event of non-acceptance. As regards bills of exchange the States are regarded as foreign.¹

The rules regarding days of grace, etc., apply to bills of exchange as well as notes.

Bank checks partake largely of the nature of drafts, the bank being the drawee. A check should be presented for payment within a reasonable time; otherwise any damage resulting from a failure to present, falls upon the payee, and not on the maker.² Thus if A, having funds in a bank, gives B a check upon the bank, and B does not present it for payment for a year, within which time the bank fails, the loss falls upon B, and he has no remedy against A. What is a reasonable time for presentment depends upon the circumstances in each case. Presentment for payment should be made as soon as possible.

The giving of a check is not ordinarily payment, but only a means of enabling the payee to obtain the money with which to satisfy his claim.³

¹ 3 Kent Comm. 93 ; 1 Par. Bills and Notes 642.

² 2 Dan. Neg. Ins. §§ 1567, 1590.

³ Id. § 1623.

CHAPTER XXIII.

PARTNERSHIP.

1. THE NATURE, CREATION, AND EXTENT OF PARTNERSHIP.

Partnership is a contract of two or more competent persons, to place their money, effects, labor, or skill in lawful commerce or business and to divide the profit and bear the loss in certain proportions. The two leading principles of the contract are :

1. A *common interest* in the stock of the company.
2. A *personal responsibility* for the partnership engagements.¹

Partners may be divided into four classes :²

1. *General* partners, or those who are held out to the world as such, and who are personally liable to the full extent of their property for the partnership debts.

2. *Special* or limited partners, or those who invest a certain amount in the capital of the firm, and whose liability as partners is limited to that amount. This subject is regulated by statute.

3. *Dormant* partners, or those who share in the profits of the firm, but have no active concern in its management, and who are not held out to the world as partners.

4. *Latent* partners, who differ from dormant partners only in that they are actively concerned in the management of the business of the partnership. The terms dormant and silent partners are sometimes used synonymously.

Persons are partners *as regards third parties*, if one of two facts exists.

¹ 3 Kent Comm. 23, 24.

² Story Part. §§ 74, 75, 80.

1. If they allow themselves *to be held out* to the world *as such*.

2. If they *share in the profits* of the firm, since, by sharing in the profits, they deduct so much from the funds to which the partnership creditors look. On this principle, dormant and silent partners are liable to the full extent of their property to partnership creditors.

To make persons partners *inter sese*, an *actual intention* to that effect is necessary.¹

Partnership may be created by *parol* as well as by writing, and can be *inferred from circumstances*.²

II. THE RIGHTS AND DUTIES OF PARTNERS IN REGARD TO EACH OTHER AND THE PUBLIC.

In regard to their *stock in trade*, partners differ from joint tenants in that there is *no right of survivorship*, and from tenants in common, in that a partner can dispose of the *whole* stock in trade, while a tenant in common can dispose only of his individual share.³

If the capital stock be invested in land, the land is regarded as *personalty* so far as the creditors are concerned. If it is agreed between the partners that the land bought with the capital shall be regarded as personal property, this agreement governs, and upon the decease of a partner, his share in the land will go to his *personal representatives*, as personal property. In the absence of such an agreement, there is a conflict of opinion as to whether the land will go to the heirs-at-law or the personal representatives.⁴ (See statutes.)

The acts of *each* partner in matters relating to the partnership are regarded as the act *of all* and bind all alike, each partner being regarded as the *agent of the others* in all partnership affairs. All acts done within the scope of this agency bind all

¹ 3 Kent Comm. 32. See 1 Lindley Part. *33 *et seq.*

² Id. 28.

³ Story Part. § 90.

⁴ Story Part. §§ 92, 93.

members of the firm. The question as to whether a particular act is within the scope of a partner's authority as agent, depends upon whether the act is appropriate or incident to the trade or business, according to the common course and usages thereof. Any *private agreement* or contract between the partners *will not release* partners from liability for the acts done by one of their number, *unless* such agreement were known to the parties dealing with the partner. Each partner is a *general agent* with regard to his copartners.¹

One partner *cannot* bind the others by an instrument *under seal* unless he has authority by a sealed instrument, except in two cases:²

1. By a *release* given to a debtor *upon payment* of a claim.

2. By an instrument under seal, when the *partnership is in bankruptcy*.

The *majority* of a firm acting in good faith, can bind the *minority* in ordinary transactions, when all have been consulted.³ One partner can sell the whole stock in trade unless such stock be land, in which case he can dispose of his own interest only.⁴

The *admission of an antecedent debt* by one partner, if made during the continuance of the partnership, binds all the partners and takes the debt out of the statute of limitations.⁵

If one partner *borrow money* on the credit of the partnership, *all* the partners *are liable*, though the money be diverted by the borrowing partner to his own use. On the other hand, if one partner borrow money on his own credit, the partnership is not liable, though

¹ See 3 Kent Comm. 41 *et seq.*; Story Part. §§ 101, 102; 1 Lindley Part. *236 *et seq.*

² Par. Part. §§ 122, 123. See 1 Lind. Part. *278.

³ Story Part. § 123.

⁴ Id. § 94.

⁵ 3 Kent Comm. 49.

the money be used for partnership purposes. The question in each case is *to whom credit was given*.¹

One partner is not permitted to deal *on his private account* in any business which is obviously at variance with the business of the partnership.²

III. **Dissolution.**—A partnership may be dissolved in six ways:³

1. By the *voluntary act of any partner*. The prevailing rule is that any partner can dissolve the partnership at will, though it had been agreed that the partnership should continue for a definite time, or that notice of an intention to dissolve should be given. The other partners have an action for damages for breach of contract. In cases involving *great loss* by an immediate dissolution, a loss which could not be adequately repaired by a judgment for damages, a *court of equity* might restrain a partner from dissolving a partnership contrary to the copartnership articles.⁴

2. By the *death* of a partner, which *ipso facto* dissolves any partnership.

3. By the *insanity* of a partner. This does not *ipso facto* dissolve a partnership, but when once established, it affords sufficient ground for a court of equity to decree a dissolution.

4. By the *bankruptcy* either of the whole partnership or of an individual member.

5. By *judicial decree*, upon any ground which seems to the court sufficient, as insanity or habitual drunkenness.

6. By any *change* in the *condition* of a partner which renders him unable to carry out his part in the partnership business.

¹ Par. Part. § 88 ; Story Part. § 134 ; 1 Lind. Part. *303.

² 3 Kent Comm. 51.

³ Id. 53 *et seq.*

⁴ Id. 54 ; 1 Par. Contr. *195. See Story Part. § 275.

When one partner retires from a firm, *notice* of the fact *must be given* to all persons who have dealt with the firm in order to relieve him from any subsequent liability as a partner to such persons. To persons who have not dealt with the firm, *the publication of notice* of dissolution in a paper of the place where the business is located is sufficient. Actual notice must be given to the parties who had had dealings with the firm when the retiring partner was still connected with it.¹

A retiring partner *cannot allow his name* to be used as a member of the firm without incurring liability, but if he has given due notice of his retirement, and his name is still used against his will, he is not compelled to take legal measures to restrain the use of his name.²

Upon the dissolution of a partnership, the partnership creditors must first look to the partnership funds for the satisfaction of their claims, while the individual creditors look to the private funds of each partner. If, after the satisfaction of the claims of private creditors, there is any surplus, the partnership creditors can look to this in case the partnership funds do not satisfy their claims and *vice versa*.³

¹ 3 Kent. Comm. 66 *et seq.*

² Id. 68.

³ Id. 65.

CHAPTER XXIV.

OTHER CONTRACTS—MATTERS OF DEFENCE.

I. **Suretyship and guaranty.**—A guaranty is a promise to answer for the payment of a debt, or the performance of a duty in the case of the failure of another person who is primarily liable to pay the debt, or perform the duty.¹ The words guarantor and surety are sometimes used as synonymous, but in event of the default of the principal, the *guarantor* is entitled to *reasonable notice* of the default, and if reasonable notice is not given, he is *let out of his obligation* to the extent that he has been damnified by failure to receive notice, while the *surety* is entitled to no notice of the default of the principal, but *becomes* himself *primarily liable* upon his principal's default.² The chief difference between an *indorser*, a *surety*, and a *guarantor* is in the nature of the notice to which each is entitled upon default of the principal.³

When the guarantee, though collateral to the principal contract, is made at the same time with it, and becomes a ground of the credit given to the principal debtor, the whole is regarded as one transaction, and the consideration of the principal contract extends to, and becomes the consideration of the guarantee. When the guarantee is made *subsequent* to the prin-

¹ 3 Kent Comm. 121.

² See Id. 124.

³ This is true of these parties only in connection with negotiable instruments. In general, the surety's liability is a primary liability; that of a guarantor secondary. See Baylies on Sureties and Guarantors 3.

cipal contract, there must be a *new consideration* in order to support it.¹

Sureties and Guarantors—How Released.—Sureties and guarantors may be released from liability in four ways.²

1. By any *fraud* practiced by the principal debtor or his creditor.

2. By the *release* of the principal debtor for a good consideration. The mere *promise* on the part of the creditor to give additional time for payment when the debt becomes due, does not release the surety, there being no consideration; otherwise, in case of a promise to give time founded upon a consideration.

3. By any *alteration*, by the creditor and principal debtor, *of the terms of the original agreement*, without the consent of the surety.

4. By the *commission* or *omission* on the part of the creditor *of any act injurious* to the surety. Thus, if the surety holds collateral security or funds applicable to the debt, the negligent loss of or injury to such funds by the principal affords the surety ground for relief in equity.

In case a surety is compelled to pay the debt, he stands in the place of the principal creditor, and is subrogated to all his rights and remedies with regard to the principal creditor.

II. A **novation** is a substitution of a new debt for an old. It may arise in three ways.³

1. When a debtor contracts a new engagement with his creditor in consideration of being released from the former engagement; as when A owes B fifty dollars, and the latter accepts A's promissory note in satisfaction of the original debt.

2. By the intervention of a new debtor, as if B owes

¹ 3 Kent Comm. 123; Baylies on Sureties 53 *et seq.*

² 1 Chitty Contr. 773 *et seq.*

³ 2 Chitty Contr. 1371.

C, and from an independent transaction A becomes indebted to B, and A promises to pay B's debt to C, and C accepts the arrangement and discharges B.

3. By the intervention of a new creditor. Thus, if B, having a claim against A, sells it to C, and A promises C to pay him the amount thereof, C becomes a substituted creditor, and the promise is binding upon A.

* III. **Arbitration.**—When two parties have submitted a question of unliquidated damages to the decision of an arbitrator, and he has made his award, *the award is binding*, unless it can itself be impeached, and in case of an action being brought on the matter submitted to arbitration, the plea of *arbitrament* and *award* is a good bar.¹ But a *mere agreement* to submit to arbitration is not a bar to an action on the matter in dispute, neither is the pendency of an arbitration.²

Defences.—There are ten usual defences to actions in contract.³

1. *Performance* of the contract.
2. *Payment*.
3. *Accord and satisfaction*.
4. The *taking of a bill of exchange*, or other negotiable instrument *in payment* of the claim.
5. The *release* of the claim by an instrument under seal, which implies a consideration.
6. *Tender*.⁴ A tender can be pleaded only when the claim is for *certain* and *liquidated* damages. It must be for the *whole amount* due, in money which is *legal tender* for debts, and must be made *absolutely* and *unconditionally*.

7. The *statute of limitations*.

8. A *set-off*, or a cross-claim, for which an action might be maintained by the defendant against the plaintiff. The set-off must be for a *certain* and *liqui-*

¹ 2 Chitty Contr. 1179.

² Id. 1183; Morse on Arb. 79.

³ See 2 Chitty. Contr. 1057 *et seq.*

⁴ Id. 1184 *et seq.*

dated amount, and the claim must have been *in existence* at the time *when the action was begun* by the plaintiff.

9. *Infancy*.

10. *Bankruptcy*, or insolvency.

Rules for the construction and interpretation of contracts and written instruments.¹

1. The *intention* of the parties is the chief thing to be looked to and ascertained in the construction of a contract.

2. The *subject-matter* of the contract, and the *situation* of the parties are to be considered in determining the meaning of the language used.

3. Contracts are presumed *to be legal*, and when a contract is capable of two interpretations, one in harmony with and the other contrary to the law, the construction favors the former.

4. Words are to be understood in their *common* and *every-day* sense.

5. *All parts* of a contract will be construed so as to be given effect.

6. In a deed, the construction is most strongly *against the grantor*.

7. When two parts of a deed are repugnant, the *first* is given effect; when two parts of a will are repugnant, the *latter* is given effect.

¹ 1 Chitty Contr. 103 *et seq.*

CHAPTER XXV.

QUASI-CONTRACTS.

An obligation, quasi-contractual in its nature (frequently called a contract *implied in law*), is one which, though in no way resting on the consent of the parties, can yet, by a fiction of law, be enforced in an action of contract. Though these obligations are not infrequently classed with contracts, the impropriety of such a classification is evident from the absence of the *element of consent*, which lies at the base of all true contracts.¹

A contract *implied in fact* does not differ in principle from an *express* contract, but merely in the nature of the evidence by which it is established. The latter is proved by the *terms* used by the parties; the former, wholly or in part, by their *acts*. The contract implied in fact is the result of *inference*; *the contract implied in law is a legal fiction, imposing a contractual obligation where there was no contract.*² Thus, a plaintiff can recover from a lunatic for necessities furnished, in an action of contract. Yet, by presumption of law, the defendant is actually without power to bind himself by a contract, and the obligation imposed by law in this case, for the benefit of the plaintiff, is perhaps as good an illustration as could be given of an obligation quasi-contractual in its nature.

These obligations have been classified with con-

¹ Keener Quasi-Contracts.

² Pollock Contr. *28; Leake Contr. 74; 1 Pothier Obl. 60, 61; Church v. Gas Light Co., 6 A. and E. 846; Rhodes v. Rhodes, 44 Ch. D. 94; Sceva v. True, 53 N. H. 627; see Bish. Contr. § 182 *et seq.*

tracts as a result of the application of the action of *assumpsit* to their enforcement. In this action a *promise* must always be alleged;¹ therefore, the fiction of a promise was adopted to bring the obligation within the scope of the remedy.² It was sought to extend relief in contract, because in many instances of quasi-contract no conceivable fiction could have brought them within reach of an action in tort, and the common-law courts were obliged to use either one or the other if they were to afford a remedy at all. Ordinarily, to avoid committing a tort, one has only to *refrain from acting*; but often in quasi-contract, *inaction on the part of the defendant is precisely the ground on which he is sought to be charged*: as when a husband, ignorant of his wife's death, is compelled to reimburse one who has paid her funeral expenses, or when an action is brought on a judgment. No fiction could have brought either of these instances within the reach of an action of tort; at least no fiction would have been as natural as is that of an implied promise which renders an action of *assumpsit* possible.³

CLASSES OF QUASI-CONTRACTS.

Although quasi-contracts have been divided into those *based upon a record, upon a statutory, official, or customary duty*, and *upon the doctrine of unjust enrichment*,⁴ the last class overshadows the others in extent and importance. The *debt created by the judgment* of a court of record is called a *contract of record*, and can be made the ground of an action of contract,⁵ but the obligation is plainly quasi-contractual in its nature, since it does not rest upon the agreement of the parties.⁶

As illustrative of the second class may be mentioned

¹ Chitty Plead. 301.

² Pollock Contr. *29.

³ See Keener Quasi-Contracts.

⁴ Id.

⁵ Leake Contr. 125.

⁶ Louisiana v. New Orleans, 109 U. S. 285.

the recovery of half pilotage fees, under a statute allowing such fees when a pilot's services are refused;¹ *the obligation of a sheriff to pay the proceeds of an execution* to the judgment-creditor;² *the duty of a common carrier* to receive goods offered for transportation.³

Quasi-contracts based on the doctrine of unjust enrichment.—Quasi-contracts of this character have been described to be those importing that some undue pecuniary inequality exists in the one party relatively to the other, which the law recognizes as requiring compensation *upon equitable principles*, and upon which the law operates by creating a debt to the amount of the required compensation.⁴ In all cases, the retention of the money, or the enjoyment of the benefit by the defendant, must be *against good conscience*. In all cases the transaction must result in the unjust enrichment of the defendant, not merely in the impoverishment of or detriment to the plaintiff.

Quasi-contracts of this nature may be divided into *two* general classes.⁵

I. Those arising when money has been *paid by* one person for the use of another.

II. Those arising when money has been *received by* one person for the use of another.

I. **The general rule** giving rise to quasi-contracts of this class is, that when a person has paid money for another under circumstances and upon occasions which make it *just and equitable that he should be repaid*, a contract for repayment may generally be implied in law without any actual agreement to that effect.⁶

¹ *Steamboat Co. v. Joliffe*, 2 Wall. 450.

² 3 Bl. Comm. 163.

³ *Keener Quasi-Contracts*; *Pollock Contr.* *28.

⁴ *Leake Contr.* 74; see *Moses v. Macfarlan*, 2 Burr. 1008; *Smith v. Jones*, 11 L. J. C. P. 100; *Lewis v. Campbell*, 8 C. B. 545.

⁵ *Leake Contr.* 76.

⁶ *Leake Contr.* 77; *Lewis v. Campbell*, 8 C. B. 545; *Lawson Contr.* § 51; *Ralston v. Wood*, 15 Ill. 159.

Three principles are to be noted in this connection.

1. A quasi-contractual obligation arises when a person has been *compelled* by law to pay, or, being legally compellable, has paid *money which another person was primarily liable to pay*, so that the latter has gained the benefit of the payment.¹

2. A quasi-contractual obligation cannot be created by the payment of the debt of another which is merely *voluntary*. The payment must be made under *legal* liability, or under *compulsion* of some sort.²

3. Though the payment be *compulsory*, it will create *no quasi-contractual obligation* in favor of the plaintiff, *unless* it operates to discharge a liability of the defendant which is recognized as such either in law or equity. The discharge of a *merely moral obligation* creates no rights in favor of the person discharging it against the person for whom it is discharged.³

Quasi-contractual obligations of Class I. ARISE COMMONLY IN THREE INSTANCES.

1. When a surety who has been compelled to pay the debt guaranteed is entitled to be reimbursed by the principal debtor.

Although the surety's right to recover in this instance can be established on the basis of a contract *implied in fact*, yet it was originally recognized as resting on a contract *implied in law*.⁴

2. When a *co-surety* or a *debtor* who has paid more than his share of the debt, is entitled to contribution

¹ Leake Contr. 77, cases cited ; Hutton v. Eyre, 6 Taunt. 289.

² Leake Contr. 85 ; Keener Quasi-Contr. 388 *et seq.* ; Johnson v. Royal Mail Co., L. R. 3 C. P. 43 ; Winsor v. Savage, 9 Met. 346 ; Jones v. Wilson, 3 Johns. 434 ; Woodford v. Leavenworth, 14 Ind. 311.

³ Atkins v. Banwell, 2 East 505 ; Sayles v. Blane, 14 Q. B. 205 ; Lawson Rights, Rem. and Pr. § 2550 ; Leake Contr. 86.

⁴ Leake Contr. 79 ; Bish. Contr. and cases cited.

⁵ Keener Quasi-Contr. 400 and cases cited.

from the other co-sureties or co-debtors. Although the right to recover can in this case be ordinarily sustained on the basis of a contract implied in fact, yet it has sometimes been recognized as quasi-contractual,¹ and in some instances it must apparently be recognized as such, as when two persons, who are sureties for the same debt, unknown to each other, by different instruments and at different times, are held to be co-sureties in the matter of contribution.²

In this connection a limitation on the common statement that there is no right of contribution as between joint tort-feasors should be noticed. While the principle is true as between tort-feasors who *knowingly* and *wilfully* commit the wrong, it does not apply to a plaintiff who has innocently done an act not tortious in its nature, but who has been compelled to indemnify a party injured thereby.³ Thus, in *Churchill v. Holt*,⁴ it was held that the plaintiff, who was the lessee of a building and who had been compelled to indemnify a person for injuries received in falling through an open hatchway, could recover from the defendant whose servants had left the hatchway open without the knowledge of the plaintiff.

The right of an insurer, who has been compelled to pay for the loss arising from injuries to property, to recover from the person who is primarily liable for the loss, is identical in principle with the right of contribution of co-sureties.⁵

3. When one person, whose goods are in legal re-

¹ *Deering v. Earl of Winchelsea*, 2 B. and P. 270; see *Tobias v. Rogers*, 13 N. Y. 59.

² *Deering v. Earl*, *supra*; *Whiting v. Burke*, 6 Ch. 342; *Norton v. Coons*, 6 N. Y. 33; *Keener Quasi-Contr.* 403.

³ *Keener Quasi-Contr.* 408, citing and discussing *Churchill v. Holt*, 127 Mass. 165; *Armstrong County v. Clarion County*, 66 Fa. St. 218; *Woolley v. Batte*, 2 C. and P. 417; *Bailey v. Bussing*, 28 Conn. 455.

⁴ 127 Mass. 165.

⁵ *Leake Contr.* 82, and cases cited.

straint for the debt of another, pays the debt to secure the release of the goods, and is then permitted to recover the amount paid from the debtor primarily liable; as if a factor should so deal with the goods of his principal as to give a lien on them to a third party, and the principal should satisfy the lien in order to recover possession.¹

II. Quasi-contractual obligations arising when money has been received by one person to the use of another.

This is to be understood simply as meaning that obligations of this class can be enforced by the plaintiff in an action of assumpsit *for money received by the defendant to the use of the plaintiff*.

The general principle which gives rise to these obligations is that when money has been received by a person under circumstances or upon occasions that require, upon principles of justice and equity, that it should be paid over to another, a debt may be implied in law, without any actual agreement of the parties to that effect.²

This doctrine is invoked most frequently in *four* instances.

1. *When one person has paid money to another for a consideration which wholly fails*; the money thus paid can generally be recovered in an action for money had and received.³

Illustrations.—The recovery of the purchase-money when goods sold have failed to be delivered by the vendor;⁴ the recovery of money paid by the assignee of a void bond;⁵ the recovery of money paid as a de-

¹ Leake Contr. 82.

² Id 88; Addis. Contr. 29; see Gorman v. Carroll, 7 Allen 199; Jamison v. Moore, 43 Miss. 598; Allen v. Burlington, 45 Vt. 202; see also Lawson Contr. § 49 and cases cited.

³ Leake Contr. 105; Lawson Contr. § 50; Hilliard Contr. § 13.

⁴ Devaux v. Conolly, 8 C. B. 640.

⁵ Flynn v. Allen, 57 Pa. St. 482.

posit upon application for shares in a proposed company which is afterwards abandoned without any allotment of shares;¹ the recovery of money paid on deposit by a purchaser of land when the vendor fails to complete the bargain by reason of defect of title;² the recovery of the premium paid on an insurance policy when the risk insured against was not incurred.³

The following principles are to be observed *by way of limitation* upon the general right of recovery in this instance :

(a). When the failure of the consideration is caused by the *plaintiff's own default*, there can be no recovery ; as when a purchaser of land, after making a deposit, refuses to complete the contract.⁴

(b). There must be *complete* and *entire* failure of consideration, if the consideration be *indivisible*, in order to maintain an action for money received. If, however, the consideration be divisible, and the price apportionable accordingly, there may be a recovery of an apportionate part of the price upon a *partial* failure of the consideration.⁵

(c). If the stipulated *consideration has been received*, the fact that it was or has become *valueless* affords no ground for recovery.⁶

(d). When the consideration has been *partially* performed, and further performance has become *impossible*, a plaintiff who has paid out money under the contract cannot recover.⁷

¹ Leake Contr. 105, and cases cited.

² Id. 107, and cases cited ; Pipkin v. James, 1 Humph. 325.

³ Stevenson v. Snow, 3 Burr. 1240.

⁴ Leake Contr. 110, and cases cited.

⁵ Id. 110, 112, and cases cited.

⁶ See Taylor v. Hare, 1 B. and P. N. R. 260 ; Begbie v. Phosphate Co., L. R. 12 B. D. 679 ; Schwabenbach v. Odorless Co., 65 Md. 34.

⁷ Leake Contr. 111, and cases cited.

2. *When money has been paid under a mistake of fact which is of such a character as to have produced a supposed liability to pay the money which in reality did not exist;*¹ and this, though the plaintiff had means of knowledge, of which he did not avail himself,² and though he had once known the fact, forgetfulness of which had led to the mistaken payment.³

Illustrations.—The recovery of money paid for goods sold, upon a mistake in the weight or measurement of the goods, or in the calculation of the price;⁴ the recovery of money paid to his lessor by a tenant who was afterwards ejected and compelled to pay rent to the real owner for the same time;⁵ the recovery of money by a grantee from a person who had collected rents for the grantor, and who continued to do so after the conveyance and in ignorance of it.⁶

The following principles are to be observed *by way of limitation* upon the general right of recovery in this instance:

(a). If a payment is made under a mistake of fact *which creates no supposed legal obligation*, there can be no recovery; as in case of a gift, made under mistake, but under no supposed liability.⁷

(b). If a payment be made as the result of a mistake of a *third party*, such as an arbitrator, or a valuer, there can in general be no recovery.⁸

¹ Leake Contr. 101; *Frontier Bank v. Morse*, 22 Me. 88; *Appleton Bank v. McGilvray*, 4 Gray 518; *Waite v. Leggett*, 8 Cow. 195; *Kingston Bank v. Eltinge*, 40 N. Y. 391.

² *Kelly v. Solari*, 9 M. and W. 54; *Kingston v. Eltinge*, 40 N. Y. 391.

³ *Id.*

⁴ *Cox v. Prentice*, 3 W. and S. 344; *Wheadon v. Olds*, 20 Wend. 175.

⁵ *Newsome v. Graham*, 6 B. and C. 71.

⁶ *Hills v. Bearse*, 9 Allen 403.

⁷ *Wilson v. Thornbury*, L. R. 10 Ch. 239; *Leake Contr.* 103; *Keener Quasi-Contr.* 26.

⁸ *Leake Contr.* 103; *Freeman v. Jeffries*, L. R. 4 Ex. 189.

(c). In order to recover money paid under a mistake, there must be a failure of consideration. If the plaintiff has received an *equivalent* for the money paid, there can be no recovery.¹

(d). The retention of the money by the defendant must be against good conscience in order to sustain a recovery. Money paid in ignorance of the fact that the claim was barred by the statute of limitations cannot be recovered.²

(e). In order to recover money paid under mistake, notice of the mistake must be given to and demand made of the defendant, *if he is unaware of the mistake*.³

A mistake of law will not afford ground for recovery, however much against good conscience the retention of the money by the defendant may be.⁴

A mistake of law occurs when the party knows the facts, but does not know the *legal consequences*.⁵

3. *When one person has wrongfully or fraudulently possessed himself of money, or of goods which he has turned into money, the rightful owner may waive the wrong and recover in an action for money had and received*.⁶

To *wave the tort* is merely to choose the remedy in contract in preference to the remedy in tort.⁷

Illustrations.—The recovery of money which the

¹ Keener Quasi-Contr. 34, citing Merchants' Bank v. National Bank, 139 Mass. 513; Illinois Trust, etc., Bank v. Felsenthal, 26 Ill. 624; United States v. Badeau, 130 U. S. 439.

² Keener Quasi-Contr. 43; Moses v. Macferlan, 2 Burr. 1005.

³ Leake Contr. 104; Kelly v. Solari, 9 M. and W. 58; Keener Quasi-Contr. 141; there is, however, some conflict in the American cases; see Leather Manufacturers' Bank v. Merchants' Bank, 128 U. S. 26, and cases cited.

⁴ Leake Contr. 104; for discussion of cases see Keener Quasi-Contr. 85 *et seq.*

⁵ Mowatt v. Wright, 1 Wend. 355.

⁶ Leake Contr. 89; Cooley Torts *93; Shaw v. Coffin, 58 Me. 254; Gilmore v. Wilbur, 12 Pick. 120; Lawson Contr. § 44, and cases cited.

⁷ Cooper v. Cooper, 147 Mass. 370.

plaintiff had been induced to pay by *false pretences*;¹ the recovery of money paid under an agreement which the plaintiff could avoid on the ground of *fraud*;² the recovery of money received by a *tort-feasor* who has *wrongfully obtained* the plaintiff's goods and converted them into *money*;³ the recovery of the *proceeds of a sale* from a sheriff who had sold the plaintiff's goods on an execution issued against another;⁴ the recovery of the proceeds of the *sale of land* obtained from the owner by wrong or fraud.⁵

The following principles are to be observed *by way of limitation* upon the general right of recovery in this instance:

(a). The tortious act of the defendant must result in his *unjust enrichment*, in order that the plaintiff may recover in an action of *assumpsit*. Mere impoverishment on the plaintiff's part is not enough.⁶

(b). Money wrongfully obtained and transferred to a third party *without notice* of the wrong cannot be recovered from such third party;⁷ *otherwise*, with goods.⁸

(c). The defendant gains the right of *set-off*, when the tort is waived and an action of contract brought, which he would not otherwise have had.⁹

¹ *Holt v. Ely*, 1 E. and B. 795; *Martin v. Morgan*, 1 B. and B. 289.

² *Street v. Blay*, 2 B. and Ad. 456; *Judge v. Stone*, 44 N. H. 593.

³ *Rodgers v. Maw*, 15 M. and W. 448; *Lamine v. Dorrell*, 2 L. Raym. 1216; *Lawson Contr.* § 43, and cases cited.

⁴ *Oughton v. Seppings*, 1 B. and Ad. 241; see *Harris v. Miner*, 28 Ill. 135.

⁵ *Morgan v. Elford*, L. R. 4 C. D. 352; *Ely v. Wolcott*, 4 Allen 506.

⁶ *Keener Quasi-Contr.* 160; *National Trust Co. v. Gleason*, 77 N. Y. 400.

⁷ *Foster v. Green*, 7 H. and N. 881; *Bayne v. United States*, 93 U. S. 642; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *State Bank v. United States Bank*, 114 U. S. 401; *Thacher v. Pray*, 113 Mass. 291.

⁸ *Glyn v. Baker*, 13 East 509.

⁹ *Thorpe v. Thorpe*, 3 B. and Ad. 580.

(*d*). The measure of recovery in each case is the amount whose retention by the defendant would be *against good conscience*; not the injury to the plaintiff, nor the amount which he may have paid.¹

4. *When a person has paid money under unlawful compulsion or extortion of any kind, it can generally be recovered in an action for money had and received.*²

This principle is invoked most frequently in *three* cases.

(*a*). To recover money paid under *duress* of the person, as imprisonment, threats of imprisonment,³ or of personal injury.⁴

(*b*). To recover money paid to remove *duress of goods*, or other property,—*i. e.*, to procure possession of property wrongfully taken or detained,⁵ or to protect the possession from threatened injury.⁶

(*c*). To recover money extorted by a person as the consideration for doing what he is *legally bound to do without such payment*, or without such excessive payment;⁷ as when a carrier refuses to carry goods except on payment of an excessive charge;⁸ or when excessive or illegal fees are charged by an official for performing the duties of his office.⁹

¹ Keener Quasi-Contr. 183; *Western Assurance Co. v. Towle*, 65 Wis. 247.

² Leake Contr. 95.

³ *Harmon v. Harmon*, 61 Me. 227; *Sartwell v. Horton*, 28 Vt. 370.

⁴ *Richardson v. Duncan*, 3 N. H. 508; *Harvey v. Boyd*, 42 Ill. 336.

⁵ *Carew v. Rutherford*, 106 Mass. 1; *Peyser v. Mayor*, 70 N. Y. 501; *Shaw v. Woodcock*, 7 B. and C. 84; *Atlee v. Backhouse*, 3 M. and W. 650.

⁶ *Heckman v. Schwartz*, 64 Wis. 48; *Cobb v. Charter*, 32 Conn. 358; *Leake Contr.* 96.

⁷ *Id.* 99.

⁸ *Ashmole v. Wainwright*, 2 Q. B. 837; *Clinton v. Strong*, 9 Johns. 369; *Beckwith v. Frisbie*, 32 Vt. 559; *Railroad Co. v. Steiner*, 61 Ala. 559.

⁹ *Morgan v. Palmer*, 2 B. and C. 729; *Walker v. Ham*, 2 N. H. 238; *Robinson v. Ezell*, 72 N. C. 231; *Dew v. Parsons*, 2 B. and Ald. 563.

The following principles are to be observed *by way of limitation* upon the general right of recovery in this instance :

(a). Money paid in compromise of a *question of right* to hold goods and not *in discharge of a demand* which is enforced by their detention, cannot be recovered.¹

(b). Money paid under compulsion of *legal process* cannot be recovered, *so long as the process stands*.² If set aside on application to the court, recovery may be had.³

(c). Money paid to prevent a threatened sale of *real property* cannot be recovered, *unless* a cloud on the title would result from the sale;⁴ otherwise, with money paid to prevent the sale of *personal property*, the reason of the distinction being that in the case of the latter the officer *takes possession*, while in a sale of real property the purchaser is left to enforce such rights as he has acquired.⁵

(d). Money paid *after the compulsion* or duress *has ceased* cannot be recovered : as in the case of the voluntary payment of a note which was given under compulsion.⁶

(e). There can be no recovery of a payment which *should have been made*, though made under compulsion or duress.⁷

¹ Leake Contr. 97; Atlee v. Backhouse, 3 M. and W. 633.

² Marriott v. Hampton, 7 T. R. 269; 2 Smith's L. C. 356, 5th ed.; Stevens v. Howe, 127 Mass. 164; Corbet v. Evans, 25 Pa. St. 310; Kobler v. Wells, 26 Cal. 606.

³ De Medina v. Grove, 10 Q. B. 152; Lawson Contr. § 47, and cases cited.

⁴ Keener Quasi-Contr. 424, and cases cited.

⁵ Id.

⁶ Id. 439; Schultz v. Culbertson, 46 Wis. 313.

⁷ Diller v. Johnson, 27 Tex. 47.

CHAPTER XXVI.

TORTS.

Wrongs are of two kinds, *public* and *private*. Public wrongs are called *crimes*. Private wrongs are called *torts*. Sometimes wrongs are of both a public and private character, as assault and battery, or certain kinds of libel; but when considered from the standpoint of injury to the individual, they are called torts.¹

Torts differ from contracts in three particulars.²

1. Joint wrong-doers, or *tort-feasors*, are *severally* liable for the injury done. There is no plea in abatement for non-joinder, and no right of contribution from each other.³

2. The *death* of either party to a tort *destroys* all *right of action*;⁴ while, as a rule, the personal representatives, and often the heirs-at-law, of contracting parties, are bound by the contracts entered into by the deceased.

3. Persons who are *not liable on their contracts*, as infants or insane persons, are *liable* for their torts.

Torts differ from crimes, aside from being regarded as private wrongs, in that in the former the wrong-doer's *intent*, as a rule, is immaterial, while in the latter criminal intent must be alleged and proved.⁵

DAMAGES.

In regard to damages, the law uses two words, *damnum* and *injuria*. *Damnum* is *actual damage* in-

¹ 1 Hill. Torts 1, 60.

² Id. 2.

³ This is true only of tort-feasors who *knowingly* engage in the wrongful act. See Keener Quasi-Contracts 408.

⁴ See local Statutes for modification of this rule.

⁵ Cooley Torts *84.

curred by a person, an actual injury to his property, person, or rights. *Injuria* is a *legal* injury, an injury for which the law will give a *remedy*.¹

In all torts there must be the infringement of a right, or the violation of a duty. Hence there may be *damnum* without *injuria*, and *injuria* without *damnum*. Thus, if A erects a building which conceals the shop of B from view, the latter might suffer great actual damage (*damnum*), but there would be no injury for which the law would give redress. This would be a case of *damnum absque injuria* (damage without legal injury). On the other hand, if A should walk over the land of B, no permission either express or implied being given, he would be liable in an action of trespass by B, for though B's land may have suffered no actual injury (*damnum*), yet there is a legal injury (*injuria*) for which he can recover nominal damages. This would be a case of *injuria sine damno* (legal injury without actual damage).

In certain cases, as when the wrong-doer's motive is *vicious* or *malicious*, the law permits the injured party to recover, in addition to his actual damages, *vindictive* (*punitive, exemplary*) damages,—*i. e.*, damages which are designed not to be so much the *reparation* of the injury as the *infliction* of a penalty upon the wrong-doer.²

To recover damages for a tort, the tort must have been the *immediate*, not the remote cause of the injury. If an injury has resulted from some wrongful act, but through the medium of some intervening cause or agency, the law attributes the injury to this latter cause, and does not trace it back to the remote cause.³ Thus, in an action against a carrier for the loss of

¹ Bouv. Law Dict., sub. *Damnum and Injuria*; 1 Hill. Torts 76; Cooley Torts *62, *81; 1 Suth. Dam. 3.

² Wood's Mayne Dam. 61 n. (1st Am. Ed.).

³ Cooley Torts *68.

goods by a flood, in which it was shown that had it not been for the lameness of a horse employed by the carrier, the goods would not have been in the way of the flood, it was held that the lameness of the horse was the remote and not the immediate or *proximate* cause of the loss, and that the carrier was not liable.¹

CLASSES OF TORTS.

Torts may be divided into three classes, *torts to the person, torts to property, torts to reputation.*

I. The chief torts to the person are assault and battery, false imprisonment, injuries arising from dangerous animals.

1. **An assault** is an attempt, with unlawful force, to inflict bodily injury on another, accompanied with ability to give effect to the attempt, if not prevented.

A battery is an assault which succeeds in its purpose.

There must always be an *intent*, express or implied, to constitute a battery. *Assent* to the commission of a battery is no defence to an action for injury sustained.²

A battery may be justified on one of three grounds.³

(a). As a *proper mode of correction*, as in the punishment of a child by a teacher or parent.

(b). As a *means of preserving the peace.*

(c). As a *necessary means of defence* of the person of oneself, or of the person of husband, wife, parent, child, master, servant, or as a means of defence of property.

2. **False imprisonment** is any unlawful restraint of a man's liberty, either by force or under the threat of force.⁴ If a person is arrested under *process*, it must have been issued by a court or officer having authority

¹ Morrison v. Davis, 20 Pa. St. 171.

² Cooley Torts *160-*164.

³ Id. *165 *et seq.*; Big. Torts 105, 108.

⁴ Cooley Torts *169.

to issue it, and there must be nothing on the face of the process informing the officer executing it that in the particular case there was no authority for issuing it;¹ otherwise the imprisonment is illegal.

An arrest without a warrant may be lawfully made in two cases.²

(1). When a *felony* has been committed, and the party making the arrest has sufficient grounds for suspecting the person arrested to be the felon.

(2). In forcible *breaches of the peace*, as in affrays and riots.

3. **As a rule, an owner is liable** for all injuries inflicted by a dangerous animal upon innocent persons who are guilty of no *contributory negligence*, if he knows, or might reasonably have been supposed to know, of the dangerous character of the animal.³ Owners are liable for injury done to the property of others by their animals, whether dangerous or otherwise.

The use of fierce dogs to defend the owner's premises may, in some circumstances, be the employment of unlawful force. The *taking of life* to prevent a mere trespass is *never lawful*, and the employment of a dog, known to be likely to inflict extreme injury, against trespassers, would be unlawful, would make the owner liable for injuries inflicted by the animal, and, in case death resulted, might, in some cases, make him guilty of manslaughter.⁴

II. The chief torts to property are trespass, waste, nuisance, conversion, injuries to incorporeal rights, seduction.

1. A trespass is an unlawful act, committed with *violence*, actual or implied, to the property, person, or

¹ Cooley Torts *172.

² Id. *175

³ Id. *342 *et seq.*; 1 Hill. Torts 592; Big. Torts 248.

⁴ See Cooley Torts *168, 169.

rights of another.¹ In this connection only that portion of the definition which refers to *property* applies. Trespass may be committed upon real or personal property by a person or his agent, or by animals. The only important exception to the rule that an owner is liable for trespasses committed by his animals, is in the case of animals which are *being driven along a highway*. Here, if due care is exercised in their driving, and they enter upon the property of another, their owner is not liable, if they are removed in a reasonable time.

Any person who is in *actual possession* of property may maintain an action of trespass.²

2. **Waste** is an injury done, or permitted to be done, to corporeal hereditaments, by the tenant, to the prejudice of the heir, the remainder-man, or the reversioner.³ It differs from trespass in that it is committed by a person lawfully in possession. Waste is of two kinds.

(a). *Permissive*, or the neglect to do that which will prevent injury, as to let a house go to decay for want of repairs.

(b). *Voluntary*, or the commission of some destructive act. The most ordinary forms of voluntary waste are *cutting off timber, opening and working mines*, and converting *arable* into *pasture* land.⁴

3. **A nuisance** is a wrong arising from unreasonable or unlawful use, by a person, of his own property, or from his improper or unlawful personal conduct, working an obstruction of or to the right of another or of the public, and producing such material annoyance, inconvenience, discomfort, and hurt that the law will presume a consequent injury.⁵

Nuisances are of three kinds.⁶

¹ Bouv. Law Dict., sub. Trespass.

³ Bouv. Law Dict., sub. Waste.

⁵ 1 Wood Nuis. 1.

² Cooley Torts *341.

⁴ Cooley Torts *333.

⁶ Id. 34.

(a). *Private*, or those committed to the hurt of the lands, tenements, and hereditaments of another, such as filthy percolations from the premises of one man on those of another. They produce damage to but *one* or a *few* persons.

(b). *Public* or common, or those which produce annoyance or hurt to the whole community in general, such as keeping a disorderly house.

(c). *Mixed*, or those which affect the community as a whole, and which also work particular damage to some individual or class, such as a ditch unlawfully dug across a highway, into which a person falls. The ditch is a public nuisance, and, to the party falling into it, a private nuisance. The person injured can maintain an action against the party who dug the ditch, while the remedy for the public is by complaint or indictment.

Carrying on an offensive trade or occupation in a remote locality for a long time, does not entitle the owner to continue it when the locality has become populous. No person can gain a right to maintain a public nuisance by *prescription*.¹

4. **Conversion** is the appropriation by one person of personal property belonging to another, to his own personal use. In all actions brought for conversion, there is an assumption that the original *taking* of the goods may have been lawful, the wrong consisting in the continuing in possession and the refusal to surrender the goods to their real owner. In this respect conversion differs from trespass, in which the original taking was unlawful.²

Conversion is of two kinds.³

(a). *Direct*, or when a person actually appropriates to his own use or enjoyment the property of another, or destroys or alters its nature.

¹ 1 Wood Nuis. 40, 105.

² Cooley Torts *442.

³ Bouv. Law Dict., sub. Conversion.

(b). *Constructive*, or when a person does such acts in regard to the personal property of another as amount, in view of the law, to an appropriation of the property to himself. Thus, an original unlawful taking is, as a rule, conclusive evidence of actual conversion.

5. The chief injuries to incorporeal rights are :¹

(a). Infringement of *patents, copyrights, and trademarks*.

(b). Injuries to the *good-will* of a business.

(c). Injuries to rights in *easements*, as by barricading a right of way, causing land to fall by excavations, interfering with the right of support in a party wall, etc.

6. **Seduction** is the enticing of a woman to unlawful sexual intercourse.² The husband has a right of action against the seducer of his wife, and the parent for the seduction of a child, provided that he is entitled to her services, *loss of service* being the ground of the action. When loss of service has been established, *vindictive* damages may be given.³

III. Torts to reputation are of three kinds. Slander, libel, and malicious prosecution.

1. **Slander** consists of words *falsely spoken*, which are injurious to the reputation of another.⁴ It is defamation addressed *to the ear*. In order to be actionable, it must be *published*, i. e., *heard by some one*.⁵

Actionable words are of two kinds.⁶

(a). Those which are actionable *per se*,—i. e., words for which an action will lie *without proof of actual damage*, damage being inferred from the nature of the publication. There are four classes of words actionable *per se*.

¹ Cooley Torts *351 *et seq.*

² Bouv. Law Dict., sub. Seduction.

³ Cooley Torts *228, *234.

⁴ Odger Libel & S. *7; see Townshend Libel & S. 4, note.

⁵ Cooley Torts *193.

⁶ Id. *194 *et seq.*

(1). Those *imputing* the commission of *an offence* involving *moral turpitude*,¹ or cognizable by a criminal prosecution which may result in a *disgraceful* punishment.

(2). Those *imputing* a *contagious disease*, involving, if known, exclusion from society, as to call a man a leper.²

(3). Words *imputing* *unfitness* for or *dishonor* in *office*, as a charge that a postmaster has robbed the mail.³

(4). Words *imputing* *want of integrity* or capacity in business, as to accuse a physician of lack of ability.⁴

(b). Words which are actionable only on account of some *actual* consequential damage which must be proved.⁵

A person who repeats a slander is equally liable with the party originating it. A statement that the person repeating a slander heard it from another is no defence to an action.⁶

2. A libel is a censorious or ridiculous writing, picture, or sign made with a malicious or mischievous intent towards governments, magistrates, or individuals.⁷ It is *defamation* addressed *to the eye*.

Libels are divided into two classes.⁸

(a). Those actionable *per se*.

(b). Those actionable on proof of *special damage*.

The first class embraces the four cases in which *slander* is actionable *per se*, and in addition any libel whose tendency is to render a person contemptible or ridicu-

¹ *Brooker v. Coffin*, 5 Johns. 188 ; *Miller v. Parish*, 8 Pick. 385.

² *Williams v. Holdredge*, 22 Barb. 398.

³ *Craig v. Brown*, 5 Blackf. 44.

⁴ *Camp v. Martin*, 23 Conn. 86 ; *Orr v. Skofield*, 56 Me. 483.

⁵ *Oakley v. Farrington*, 1 Johns. Cas. 129 ; *Odiorne v. Bacon*, 6 Cush. 185.

⁶ Cooley Torts *220.

⁷ Bouv. Law Dict., sub. Libel, and cases cited.

⁸ Cooley Torts *205.

lous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him.¹

A **civil action** only lies for slander, but libel in some cases is a *criminal* as well as a civil offence, and may be prosecuted by indictment. Such libels are those whose tendency is to *disturb the public peace* and good order of society. They include libels which are actionable *per se*, and some others.²

To sustain an action for either slander or libel, there must be *malice*.

Malice is of two kinds.³

(a). *Express*, or that which is shown by evidence to actually exist.

(b). *Implied*, or that which the law, from the facts, assumes to exist.

In cases of slander and libel actionable *per se*, malice is presumed, and no proof of its existence is necessary.⁴

The **truth of a slander or libel** is a defence to a *civil* action, but, as a rule, it is not a defence to an indictment for libel, the public injury resulting from it not being affected by its truth or falsity.⁵

PRIVILEGED COMMUNICATIONS.

Under certain circumstances persons uttering or publishing words which would otherwise be actionable, are not held liable, owing to the communications being regarded as *privileged*. These cases are divided into two classes.⁶

(a). Cases *absolutely* privileged, so that no action can be maintained, though it be alleged that the publica-

¹ *Lindley v. Horton*, 27 Conn. 58.

² 3 Greenl. Ev. § 164; *Starkie S. and L.* *170; *Townshend L. & S.* 6.

³ *Cooley Torts* *209; *Townshend S. & L.* 66.

⁴ *Starkie S. & L.* *294.

⁵ *Cooley Torts* *207.

⁶ *Id.* *210 *et seq.*

tion was both false and malicious. The chief instances are :

- (1). That of a *witness* testifying in court.
- (2). That of a *legislator* speaking in the legislative body of which he is a member.
- (3). That of *executive* and *judicial* officers, as regards their *official utterances*.

(b). Cases *conditionally* privileged to the extent that there will be no *presumption* of malice, but which render the party liable, if both falsehood and malice are proved, as in case of a petition to the appointing power for the removal of an official, or of a father discussing with a daughter the character of a suitor.

Belief in the truth of a slander or libel, and the most careful investigation of the grounds of belief, are no defences to an action, though they may prevent the awarding of exemplary damages.¹

3. **Malicious prosecution** is a wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil cause, *without probable cause*, by a regular process or proceeding, which the facts did not warrant, as appears by the result.² To maintain an action for malicious prosecution, the plaintiff must prove four things.³

(a). That a *suit* or proceeding *had been begun* against him by or at the instigation of the defendant.

(b). Want of *probable cause* on the part of the defendant.

(c). *Malice* on the part of the defendant.

(d). The *termination* of the suit or proceeding *in his favor*.

Probable cause means the existence of such facts and circumstances as would excite the belief in a

¹ Townshend S. & L. 324 ; Odger L. & S. *302.

² Bouv. Law Dict., sub. Malicious Prosecution.

³ Id.; Cooley Torts *181 *et seq.*

reasonable man that the plaintiff was guilty of the offence charged, or that there was ground for an action against him. As a rule, the fact that the defendant acted under the *advice of counsel* in beginning the proceeding is a bar to an action for malicious prosecution. The burden of proof is on the plaintiff to show lack of probable cause.

Malice must be proved by plaintiff. It may be either express or implied. Malice may be inferred from lack of probable cause, but lack of probable cause *cannot* be inferred from malice.

An action for malicious prosecution will lie for the institution of a *civil suit*, though the exact instances are as yet uncertain. It can, however, be maintained in the following cases: malicious institution of proceedings in *bankruptcy*, of a civil suit accompanied by the *arrest* of the defendant, of proceedings to have a person declared *insane* or for the *appointment of a guardian*.

CHAPTER XXVII.

EQUITY.

History.—Equity is that system of jurisprudence which affords a remedy where there is no *plain, complete*, and *adequate* remedy at common law.¹ In England, its administration belongs to the Court of Chancery. The precise origin of the equitable jurisdiction of this court is uncertain, but the following explanation by Lord Hardwicke seems most probable.² The administration of justice in England was originally in the hands of the Great Court, or Council of the King, which acted as a supreme court of judicature. Afterwards this court was dissolved, and its jurisdiction distributed among various courts, it being given principally to the Court of Common Pleas, of King's Bench, of the Exchequer, and of Chancery. Now all original writs under the great seal returnable to the common-law courts were issued from Chancery. Many petitions being presented to Parliament and the King for relief which could not be obtained by a resort to common law, they were, as a rule, referred to the Privy Council of the King, which, in turn, sent them to the Chancellor, who was to decide whether the common-law actions were insufficient for the case, and if they were found to be so, he proceeded to give relief through the Court of Chancery. As originally the granting of such relief rested in the judgment and discretion of the King, as represented by the Chancellor, the granting of it was said to be a matter of *grace*, and not of *right*.

¹ 1 Story Eq. Juris. § 33.

² See Id. § 43; Bisph. Eq. § 6 *et seq.*; Tied. Eq. § 4.

The courts of common law were unable to grant full relief in every case, for two reasons.¹

1. Because of the *limited number of actions*, by which the rights of all parties could not be protected in every instance.

2. Because of the closeness with which the common-law judges adhered to certain *ancient* and very *technical* decisions.

Originally, proceedings at equity and law differed in two essential points.²

1. In equity, there was *no oral testimony*. All testimony was taken by depositions.

2. In equity, the court was judge both of law and *fact*. The court could, in its discretion, frame an issue of fact and send it to a jury for determination, but the finding of the jury was not binding on the judge.

At present, the essential difference between courts of equity and of common law is best illustrated by the result of a trial in each. At common law the trial results in a *judgment* for the defendant, or for damages for the plaintiff. In equity the trial results in a *decree*, in which all the rights of the parties are adjusted. A decree may be partially in favor of the plaintiff and partially for the defendant, while a judgment must be wholly in favor of one or the other.

Courts of equity now, at least, follow precedent as closely as do courts of law. The difference between the two lies in the form of the proceedings and in principles. Equity is enlightened law, untrammelled by confinement to a limited number of actions.

MAXIMS OF EQUITY.

There are ten maxims of equity, of chief importance.³

1. *Where there is a right, there is a remedy,—i. e.,*

¹ Bisph. Eq. § 7; see also Tied. Eq. § 3; 1 Pom. Eq. Juris. § 16.

² Bisph. Eq. 16.

³ See Bisph. Eq. § 37 *et seq.*; 1 Story Eq. Juris. § 64 *et seq.*; Tied. Eq. § 13 *et seq.*

whenever there is an infringement of a legal right, equity will give a remedy, if there is none at common law.

2. *Equity follows the law*,—i. e., the principles and rules of the common law are adopted whenever this can consistently be done. Thus equitable estates are distributed according to the rules for the distribution of legal estates.

3. *When the equities are equal, the law will prevail*. Thus if a purchaser, for a valuable consideration, without notice of an equitable right, obtains the *legal* estate at the time of the purchase, he will hold as against the owner of the equitable title. This maxim supported the doctrine of "tacking" in mortgages. (See page 42.)

4. *Equity favors the active, not the passive*. This is designed to encourage diligence and punish laches.

5. *Equality is equity*. Thus, if A conveys an estate in trust to B, to be conveyed by him to such one of four persons as he might deem best, and B dies, having failed to execute this power, a court of equity will divide the property equally among the four.

6. *He who comes into equity must come with clean hands*. Thus, equity will not enforce a gaming transaction.

7. *He who seeks equity must do equity*. Thus, if a person seeks relief from a usurious contract, he must offer to return the borrowed money, together with lawful interest.

8. *Equity considers that as done which ought to be done*. Thus, if a testator has provided absolutely that lands be sold and converted into money, equity will regard the change as having taken place at the moment of the testator's death, and the property will be governed by the rules of personal property.

9. *When the equities are equal, priority of time will*

prevail. Thus, if A has an equitable estate which he mortgages to B, and subsequently A conveys his equitable estate to C, C will take the equitable title subject to the mortgage of B.

10. *Equity acts in personam.* Hence when the parties are within the jurisdiction of a court of equity, it will act, though the property in question may be outside the jurisdiction. Thus, it is settled that a decree of foreclosure and a sale of mortgaged property is valid, though a part of the property is without the jurisdiction of the court ordering the sale.¹

JURISDICTION OF EQUITY.

There are eleven chief heads of equitable jurisdiction: trusts, mortgages, assignments, accident, mistake, fraud, notice, estoppel, conversion, adjustment, liens.

1. **A trust** is an equitable right, title, or interest which a person has in property, the legal title to which lies in another.² The person holding the legal title is called the *trustee*, and the person for whose benefit it is held is called the *beneficiary* or the *cestui que trust*. Trusts correspond to uses as they existed prior to the statute of uses. (See page 69.)

Trusts may be divided into two classes.

1. *Express* trusts, or those which are created in express terms.

2 *Implied* trusts, or those which, without being expressed, are deducible from the nature of the transaction, or which are inferred as existing by equity, independent of the intent of the parties.³

Implied trusts may be divided into two classes, *constructive trusts* and *resulting trusts*.⁴

(a). **Constructive trusts** are those which arise by

¹ Muller v. Dows, 94 U. S. 444.

² 2 Story Eq. Juris. § 964.

³ See Bouv. Law Dict., sub. Trust.

⁴ 2 Story Eq. Juris. § 1195; Tied. Eq. § 308.

construction of equity, *regardless of the intent of the parties.*¹ There is no element of fraud in constructive trusts as here referred to. Trusts of this kind arise most frequently from the rule that "Whenever one person is placed in such relation to another that he becomes interested for him or with him in any subject of property, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated."²

Thus, if a trustee renews a lease in his own name and with his own funds, this renewal inures to the benefit of the cestui que trust, the trustee being still regarded as trustee for the beneficiary in respect to the lease.

(b). **Resulting trusts** are those raised by implication of law, and are presumed to exist *from the supposed intention* of the parties and the nature of the transaction.³

They may arise in four ways.⁴

(1). When *one person* pays the purchase-money, but takes the title to the property in the name of *another*. Thus, if A buys land, but has the deed made to B, B is regarded as trustee for A. It is essential that the payment be made prior to or at the time of the conveyance.

There is one exception to this rule in regard to a resulting trust, namely, in *advancements*.⁵ An advancement is a purchase by a parent, or by one standing in the place of a parent, with the conveyance taken in the name of the child. Here the presumption is that the purchase was intended for the benefit of the child, and no trust results to the parent except on proof that the purchase was not meant as an advancement.

¹ Bisph. Eq. § 91.

² 1 Lead. Cas. in Eq. 62 n. (4th Am. Ed.).

³ Bouv. Law Dict., sub. Resulting Trust.

⁴ Bisph. Eq. § 79 *et seq.*; 2 Story Eq. Juris. § 1195 *et seq.*; 2 Pom. Eq. Juris. § 1031 *et seq.*

⁵ 2 Story Eq. Juris. § 1213 *et seq.*; Bisph. Eq. § 84.

(2). When a trustee buys property *in his own name, but with trust funds*.

(3). When the *trusts* of a conveyance *are not declared*, or are but partially declared, and fail, the trustee does not hold for his own benefit, but as trustee for the donor himself, or of his heirs-at-law.

(4). Where there is a *voluntary conveyance*, without any consideration, and it is evident that it was not intended that the grantee should hold the property for his own benefit.

Express trusts.—An express trust of personal property may be proved by parol, but an express trust of real property must be in writing.¹ Three things are essential to the creation of an express trust.²

(a). *Sufficient words* to create a trust.

(b). A *definite subject-matter*,—i. e., definite property on which the trust is to operate.

(c). A *definite object*, for whose benefit the trust is created.

Trusts may also be divided into two other classes.³

1. **Active trusts**, in which the trustee has some duty to perform, as the conveyance of an estate to A as trustee, who is to pay the debts of the testator and then to convey the property in certain proportions to the children of the testator.

2. **Passive trusts**, sometimes called dry trusts, which require no action on the part of the trustee to carry out the trust, but in which he is merely the depository of the legal estate. In such a trust, the cestui que trust may compel a conveyance of the legal estate to himself by the trustee.⁴

Trusts may still further be divided into two classes.⁵

1. **Executory trusts.** Where some further act is re-

¹ Bisph. Eq. § 63.

² *Cruwys v. Colman*, 9 Ves. 323.

³ Tied. Eq. § 288; Bisph. Eq. § 54.

⁴ 1 Lewis Trusts *18.

⁵ Bisph. Eq. § 57; Tied. Eq. § 293.

quired to be done by the trustee to give the trust its full effect, as in the creation of a trust by will, in which the trustees are directed to convey the property held in trust to certain persons at a certain time.

2. **Executed trusts**, where the interests to be created are fully defined and created by the instrument creating the trust, so that no further conveyance is required to perfect them, as the appointment of A to hold property as trustee for B until he reaches the age of twenty-one, and at that time the trust to cease, and B to become seised of the legal as well as the equitable estate.

Trusts may be still further divided into two classes.¹

1. **Private trusts**, or those in which the beneficial interest is ultimately in one or more definitely ascertained individuals.

2. **Public or charitable trusts**. These trusts differ from others in two particulars.²

(a). The rule against perpetuities does not operate against them.

(b). Certainty in the objects of the trust is not essential.

The following four classes of trusts have been construed to be charitable:³

(1). Trusts for the purposes of *religion*.

(2). Trusts for the purposes of *education*.

(3). Trusts for *eleemosynary* purposes.

(4). Trusts for the *purpose of relieving the government* of burdens, as trusts for the building of town-houses, etc.

The *cy pres* doctrine is most frequently invoked in carrying out trusts of this nature. (See page 81.)

Thus, in a trust "for the preparation and circulation

¹ Bisph. Eq. § 59; Tied. Eq. § 303.

² Id. §§ 116, 133; Id. §§ 306, 307.

³ Id. § 120 *et seq.*; Id.

of books and such other instruments as in the judgment of the trustees will tend to create an anti-slavery sentiment, and for the benefit of fugitive slaves," negro slavery having been abolished when the will creating the trust went into effect, under the *cy pres* doctrine the fund was applied to the New England Branch of the American Freedmen's Union Commission.¹

II. **Mortgages.** (See page 40.) As equity originally interfered to protect the mortgagor, it came to have complete jurisdiction in all matters pertaining to the foreclosure, redemption, etc., of mortgages.²

III. **Assignments.** At common law no chose in action could be assigned, because otherwise it was feared that litigation would be encouraged, and it also seemed absurd to the common lawyers that a person could sell a thing of which he did not have possession. But such assignments were upheld in equity, as were also assignments of future and contingent interests, such as the earnings of a ship.³

IV. **Accident.** An accident is an unforeseen and injurious occurrence, *not attributable to mistake, neglect, or misconduct.*⁴

Equity gives relief in three instances.⁵

1. When *deeds*, or other written instruments, *are lost*. If the loss is without fault on the part of the loser, equity will decree a re-execution of the instrument. It may also direct the loser to give to the party who re-executes the instrument, a bond of indemnity, to protect him from any injury which may occur to him from the discovery of the lost paper.

2. When *penalties* in bonds are *accidentally incurred*. A *penal* bond is one in which the amount for which

¹ Jackson v. Phillips, 14 Allen 556.

² Tied Eq. § 414.

³ Bisph. Eq. §§ 162, 164; *In re Ship Warre*, 8 Price 269.

⁴ Smith Eq. 36; Story Eq. Juris. § 78.

⁵ Bisph. Eq. § 176 *et seq.*

the obligor is liable, in event of breach of condition, is fixed. This amount is called the *penalty*. Equity first gained jurisdiction by giving the obligor or the sureties relief when, on account of some accident, the obligor was unable to fulfill the conditions on the precise day named in the bond. Jurisdiction once gained, however, equity went further, and declared that, on breach of condition, the obligor should be obliged to pay only the amount *actually* due to, or the damages actually sustained by, the obligee, on account of breach of condition, and not the penalty named in the bond.

The question commonly is whether the amount stated in the bond is a penalty, or whether it is an amount agreed upon by the parties as a recompense for the damages suffered in event of condition broken. In the latter case equity gives no relief.¹

The amount of a bond will be construed as a penalty, and consequently relief will be given, unless the damages are uncertain, and it is impossible to render them certain.

An obligor cannot escape an action for the specific performance of an agreement stated in a bond, by electing to pay the penalty. The giving of such a bond does not affect the question of specific performance.²

3. *A defective execution of a power*, as in case of a trustee, with power to sell, who executes an imperfect conveyance to a purchaser.

IV. Mistake. A mistake arises when a person, under some erroneous conviction of law or of fact, does or omits to do some act, which, but for the conviction, he would not have done or omitted to do.³ Mistakes are of two kinds, mistakes of *law* and mistakes of *fact*.

1. As a rule, equity gives *no relief for mistakes of*

¹ Bisph. Eq. § 173 *et seq.* ; 1 Story Eq. Juris. § 89 ; Adams Eq. *108.

² Bisph. Eq. § 180.

³ Haynes Outlines of Eq. 132.

law. Ignorance of the law excuses no one. This rule has been somewhat shaken however.¹

Courts readily take advantage of circumstances on which to base relief, especially if advantage has been taken by one party of the ignorance of the other, or if any attempt has been made to confirm this ignorance.²

2. A mistake of fact will be relieved in equity if the mistake is *mutual, material*, and not caused by *negligence*.

V. Fraud. There are many remedies at common law for redressing injuries arising from fraud, but they are often inadequate from their very nature. The aim of equity, in the matter of fraud, is to *place the parties*, so far as possible, *in their condition prior to the commission of the fraudulent act*, the nature of equitable remedies rendering this possible. Again, at law fraud must always be *proved*; there is never a *presumption* of fraud; while in equity, an *indisputable* presumption of fraud frequently arises from the relations of the parties or the nature of the transaction.³

Equity has jurisdiction in all cases of fraud, with two exceptions.⁴

1. In cases of fraud used in regard to a *will*, in which courts of probate have exclusive jurisdiction.

2. In cases where the remedy at law is *complete* and *adequate*.

Fraud is divided into two classes.⁵

1. *Actual* fraud, or the intentional and successful employment of any cunning, deception, or artifice to circumvent, deceive, or cheat another.

2. *Constructive* or legal fraud,—*i. e.*, fraud which is presumed from the nature of the case, the relations of the parties, etc.

¹ See Bisph. Eq. § 187 *et seq.*; Keener Quasi-Contract, 85 *et seq.*; 2 Pom. Eq. Juris. § 842 *et seq.* ² Bisph. Eq. § 188, and cases cited.

³ Bisph. Eq. §§ 197, 198, 201.

⁴ Id. §§ 199, 200.

⁵ 1 Story Eq. Juris. § 184 *et seq.*, § 258.

Fraud may also be divided, according to Lord Hardwicke, into four classes.¹

1. Fraud arising from the *facts and circumstances* of the imposition.

2. Fraud apparent from the *intrinsic nature of the bargain* itself.

3. Fraud which is *inferred from the circumstances and relations* of the parties.

4. Fraud inferred from the *nature and circumstances*, of the transaction as being a fraud on *third parties*.

1. In order to make a representation fraudulent, in this class of fraud, four facts must exist.²

(a). The *representation* must be actually *false*.

(b). It must be supposed to be untrue by the party making it.

(c). It must be *relied on* by the party to whom it is made.

(d). It must be a *material* misrepresentation.

2. A transaction of the second class may be fraudulent on two grounds.³

(a). Because of its *terms*, as in a contract where the consideration is *grossly inadequate*—contracts are, however, rarely set aside on this ground alone,—also in case of *usurious* contracts and *gambling* transactions.

(b). Because of its *subject-matter*, as in marriage brocade contracts, contracts in restraint of marriage and of trade. (See page 93.)

3. Fraud of this kind may arise from two circumstances.⁴

(a). From the *mental disability* of one party, as in case of idiots and insane persons.

(b). From the supposition of *undue influence* arising from the relations of the parties. These relations are ordinarily four.

¹ *Chesterfield v. Janssen*, 1 Atk. 301.

² Bisph. Eq. § 206 ; *Adams Eq.* *176.

³ Bisph. Eq. §§ 219, 224.

⁴ *Id.* § 230 *et seq.*

- (1). *Guardian and ward.*
- (2). *Parent and child.*
- (3). *Attorney and client.*
- (4). *Trustee and cestui que trust.*

Gifts to the guardian, parent, attorney, or trustee from, and contracts to their advantage, with the ward, child, client, or cestui que trust, are regarded with the *greatest disfavor* by courts of equity, and are set aside upon the least indication of undue influence. In some instances the transaction can be set aside at the option of the party presumably imposed upon, as in case of a gift from client to attorney,¹ while in others the presumption of fraud is *prima facie* only, and may be removed by evidence of perfect fair dealing and absence of undue influence, as in case of a transaction between parent and child.²

The general rule is that no party in a fiduciary relation can be permitted to profit at the expense of the party whose interests are confided to him.³

4. The most familiar instance of fraud of this class is found in conveyances designed to *defraud creditors*. Such conveyances are void, though given for a valuable consideration, *provided* that the purchaser knew of the intent to defraud.⁴

VI. **Notice.** The doctrine of notice had strictly no application at common law. There parties stood solely on their legal titles, and notice or knowledge of a prior title was of no effect. The rule in equity, however, is that a purchaser who takes property with notice of valid claims and encumbrances upon it, takes it *subject to those claims* and encumbrances.⁵

Thus, if A holds the legal title to an estate charged

¹ *Holman v. Loynes*, 4 D. G. M. & G. 270; *Greenfield's Estate*, 14 Pa. 489.

² *Taylor v. Taylor*, 8 How. 183.

³ See *Bisph. Eq.* §§ 234, 238; 1 *Story Eq. Juris.* § 307 *et seq.*

⁴ *Bisph. Eq.* § 243.

⁵ *Id.* §§ 261, 262.

with a trust, and conveys the estate to B, who purchases in good faith and for a valuable consideration, and *without notice of the trust*, he holds it discharged from the trust. But if he takes it *with notice*, he takes it subject to the trust.

Notice is the knowledge, either actual or constructive of some act done. It is of two kinds.

1. *Actual*, when the knowledge is actually brought home to the party to be charged with it, as where one sees the record of a deed.

2. *Constructive*, when the party, by any circumstance, is put upon inquiry, or certain acts have been done, of which knowledge is presumed on grounds of public policy ;¹ as in case of a party in possession of a deed which refers to another deed given to another party. Here the party having the first deed has constructive notice of the contents of the second. There is also constructive notice of the record of a deed, of a publication in a newspaper when it is authorized by legal process, of the public acts of government, and of the pendency of a suit (*lis pendens*).

VII. **Estoppel** is the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or on the part of those under whom he claims, or by an adjudication of his rights which he cannot be allowed to question.²

Estoppel is of three kinds.³

1. By *deed*. A party to a deed is estopped to deny anything therein which has operated on the other party. This estoppel affects only parties and privies in *blood, law, or estate*, as ancestor and heir, executor or administrator and the person deceased, lessor and lessee, etc.

2. By *matter of record*, as by the adjudication of a proper court.

¹ Bouv. Law Dict., sub. Notice ; Bisph. Eq. §§ 263, 268.

² Bouv. Law Dict.

³ Id. ; Bisph. Eq. § 281.

3. By matter *in pais*. Such an estoppel arises from the acts and declarations of a person by which he intentionally induces another to alter his position injuriously to himself, as when A stands by and allows B to sell property which belongs to A, without remonstrating. A is then estopped to deny that B had title to the property. That is, he cannot assert his title against the purchaser from B.

Estoppels by deed and record are *common-law* estoppels. Estoppels by matter in pais, are *equitable*.

To work an estoppel by matter in pais, five things are essential.¹

(a). *A representation or concealment of material facts by the party to be estopped.*

(b). *Knowledge of the facts on the part of the person making the representation.*

(c). *Ignorance of the facts on the part of the person to whom the representation was made.*

(d). *An intention that the party to whom the representation was made should act upon it.*

(e). *Action on the representation by the party to whom it was made.*

The doctrine of estoppel operates in *election*. Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights, in cases where there is a clear intention on the part of the person from whom he derives one that he should not enjoy the other ;² as if A should, by will, give \$1,000 to B, on condition that B should give certain property of his to C. Here, B must choose whether to retain his own property, and surrender the legacy, or whether to accept the legacy and transfer the specified property to C. When the choice is made, he is estopped from asserting any interest in the other right. Thus, if he accepts the \$1,000, he is estopped to deny that the specified property of his should be given to C.

¹ Big. on Estoppel 569.

² 2 Story Eq. Juris. § 1075.

VIII. **Conversion.** By conversion, in equity, is meant a change of property from personal into real, or from real into personal, not actually taking place, but supposed to take place by construction of equity.¹ When money has been directed to be employed in the purchase of land, or when land has been directed to be sold and converted into money, equity will suppose the change to have taken place, and will regard the money as land, and the land as money. Thus, if A enter into a valid contract with B for the conveyance of certain land from B to A, A is regarded, in equity, as the owner of the land; he can devise it, and if he dies before the conveyance is made, his personal representatives must pay for the land thus bargained for, which, of course, descends to his heirs-at-law. Thus, the money which A was to pay for the land is regarded, in equity, as converted into land. So, if B dies before making the conveyance to A, his personal representatives can bring an action for specific performance against A, and the money so obtained for the land goes to the personal representatives, to be distributed according to law. Conversion depends largely upon Maxim 8.

IX. Under Adjustment four topics may be considered, *contribution*, *exoneration*, *subrogation*, and *marshalling of assets*.

I. The right of *contribution* arises when one of several parties who are jointly liable for the payment of a debt, pays the whole of it for the benefit of all. The principle of contribution is applied most frequently in the case of *sureties*.² Originally, the surety paying the whole debt had no common-law remedy against his co-sureties. Later, a common-law action was allowed on the ground of an implied promise by the co-sureties to pay their share of the debt.

¹ Bisph. Eq. § 307.

² Id. § 328 *et seq.*

The equitable remedy is superior, however, because it can enforce contribution from the personal representatives of a deceased surety, and, in case any of the sureties are insolvent, can compel the solvent sureties to pay their proportional amounts, without regard to the insolvent sureties.

2. By *exoneration* is meant the right of those who are successively or *secondarily* liable, to look for reimbursement to those who are previously or *primarily* liable.¹ Thus, if a surety pays a debt, he can proceed against his principal, and a surety who by his contract is liable only upon the default of his principal or of a prior surety, can proceed against either for reimbursement.

3. *Subrogation* is the right by which a person who is secondarily liable for a debt, and has paid it, is put in the place of the creditor, and has the right to receive from the creditor all other security which he held against the principal debtor.² Thus, if A holds a note of B's, secured by a mortgage, and C is surety on the note, and, upon default of payment by B, pays it, C stands in the place of A, so far as the mortgage is concerned, and can compel an assignment of the mortgage by A.

4. By *marshalling of assets* is meant that if one party has a lien on, or interest in, *two* funds for the satisfaction of a debt, and another party has a lien on, or interest in, but *one* of the same funds for the satisfaction of a debt, the second party can compel the first party to resort to that one of the funds on which the second party has no claim, before he resorts to the other fund.³ Thus, if A has a mortgage on lots 1 and 2, and B has a mortgage on lot 2 only he can compel A to exhaust the security afforded by his

¹ Tied. Eq. § 530.

² Bisph. Eq. § 335; see Tied. Eq. § 531.

³ 1 Story Eq. Juris. § 633.

mortgage on lot 1, before he resorts to his mortgage on lot 2. Instead, however, of B's restraining A from resorting to his mortgage on lot 2, the more usual way is to *subrogate* B to all of A's rights, after A has satisfied his claim in whatever way he sees fit.¹

X. **Equitable liens** are liens enforced by courts of equity only.² They differ from common-law liens in that *possession* is not essential.³

The chief equitable lien is the *vendor's* lien for unpaid purchase-money in case of the conveyance of land. This lien can be enforced against all parties who take with notice of it. Thus, if A conveys land to B, giving the latter the deed, and before payment of the purchase-money B conveys to C, who takes *with notice* of the fact that the purchase-money has not been paid,⁴ A can enforce, by a bill in equity, his lien on the land in the hands of C. This lien is not recognized in many States, and in others only with qualifications.⁵

An equitable mortgage is one created by the deposit of title-deeds with a creditor as security for a debt.⁶ In some States this is recognized as creating a mortgage on the land, as between the parties, which may be enforced in equity as a lien on the land.

¹ Bisph. Eq. § 341.

² Bouv. Law Dict., sub. Lien.

³ Bisph. Eq. § 351.

⁴ Id. § 356.

⁵ Id. § 353.

⁶ Id. § 357.

CHAPTER XXVIII.

EQUITABLE REMEDIES.

THERE are eleven equitable remedies of chief importance,—*specific performance, injunctions, re-execution, rescission and cancellation of written instruments, account, creditors' bills, bills of discovery, partnership bills, bills quia timet, bills of peace, bills of interpleader, bills to take testimony de bene esse.*

I. By specific performance is meant the actual performance of a contract by the party bound to perform it.¹ As a rule, equity will compel the specific performance of a contract *when the common-law remedy of damages for its breach is inadequate.*²

Specific performance of contracts for the transfer of *real property* is enforced most frequently because, as a rule, a breach of contract in regard to personal property can be adequately remedied by an action for damages. If, however, this remedy is not adequate, a contract in regard to personalty will be enforced specifically as readily as one in regard to realty. Thus, if A wishes to obtain 1,000 shares of stock for a particular purpose, and B has agreed to sell him 10 shares, which are the last obtainable, and which will make up the desired number, equity will compel B to transfer his 10 shares to A.³

In order that a court may decree the specific performance of a contract, four things are essential.⁴

¹ Bouv. Law Dict.

² 2 Story Eq. Juris. § 716.

³ Id. § 717 *et seq.*; Bisph. Eq. §§ 364, 368.

⁴ Bouv. Law Dict., sub. Spec. Per.; see Bisph. Eq. § 372 *et seq.*; 3 Pom. Eq. Juris. § 1405 *et seq.*; Tied. Eq. § 497.

1. The contract must be founded upon a *valuable* consideration, and this consideration must be *proved*, though the contract be under seal.¹

2. The enforcement of the contract must be *practicable*.²

3. The specific performance of the contract *must be* actually *necessary* to the plaintiff, and *not oppressive* to the defendant.³

4. When a contract is required to be in writing by the statute of frauds, *it must be in writing* if specific performance is asked.⁴

The specific performance of contracts to convey land is, however, granted in three cases, though the contract is not in writing.⁵

(a). When there has been a *part performance*. Thus, if A orally agrees to sell land to B, and B takes possession and erects a building on the land, B can compel specific performance of the contract on the part of A.⁶ What amounts to a part performance sufficient to take the case out of the statute, depends upon the circumstances of each case.

(b). When the *reduction* of the contract *to writing* has been prevented by *fraud*. Thus, if an intended husband promises to have a marriage settlement reduced to writing, and by fraud prevents its being done, and the marriage occurs, the agreement in regard to the marriage settlement can be enforced specifically.⁷

(c). When in an action for specific performance, *the*

¹ Lear v. Chouteau, 23 Ill. 39; Smith v. Phillips, 77 Va. 548; Thompson et al. v. Allen, 12 Ind. 539.

² Johnson v. Railroad Co., 3 DeG. M. and G. 914; Marble Co. v. Ripley, 10 Wall. 339.

³ 1 Beasl. Ch. 497; 2 Jones Eq. 267; Adams Eq. *83 et seq.

⁴ Bisph. Eq. § 382; 2 Story Eq. Juris. § 752 et seq.

⁵ Id. § 383; Id. §§ 755, 759, 768.

⁶ Maddison v. Alderson, 8 App. Cas. 474; Wainwright v. Talcott, 60 Conn. 43.

⁷ Montacute v. Maxwell, 1 P. Wms. 618; Wharton's Ev. § 911.

defendant in his answer *admits* the oral contract, and does not set up the statute in defence.¹

II. **Injunctions.** An injunction is a prohibitory writ, issued by the authority of a court of equity, to restrain one or more of the parties to a proceeding in equity from doing, or permitting those under their control to do, an act which is regarded as unjust or inequitable so far as the rights of other parties to the proceedings are concerned.²

With regard to their *nature*, injunctions are divided into two classes.

1. *Mandatory*, or those commanding the defendant to do a particular thing.³

2. *Preventive* or prohibitory, or those commanding the defendant to refrain from some act.⁴

With regard to the *time* when issued, injunctions are divided into two classes.⁵

1. *Interlocutory* or preliminary, or those granted to restrain the defendant from doing some act, either temporarily or during the pendency of the suit.

2. *Final* or perpetual, or those which are issued in the final decree of the court, when the rights of the parties are finally adjudicated and disposed of by the order or decree of the court, and by which the defendant is perpetually enjoined from doing the act in question.⁶

Injunctions are resorted to most frequently to prevent *waste*, *nuisances*, *trespass*, to protect *copyrights*, *patent-rights*, *trade-marks*, and *property* pending litigation.⁷

¹ *Harris v. Knickerbocker*, 5 Wend. 638 ; *McGowen v. West*, 7 Mo. 569 ; *Browne Stat. Frauds* § 476.

² *Bouv. Law Dict.* and authorities cited.

³ *Joyce Injunctions* 1309.

⁴ *Bisph. Eq.* § 401.

⁵ *Kerr Injunctions*, Chap. II.

⁶ *Kershaw v. Thompson*, 4 Johns. Ch. 610.

⁷ *Bisph. Eq.* § 428 *et seq.*

III. **Re-execution** is resorted to when written instruments have been lost or destroyed. It is the principal remedy when a deed has been lost, thus destroying a link in a chain of title.¹

Reformation is the remedy by which an instrument is reformed so as to correctly express the intention of the parties. It is resorted to most frequently in cases of *mistake* or *fraud*.²

The rescission and cancellation of instruments depend upon the discretion of the court, and decrees to that effect are made when necessary for the protection of the parties, as when *forged* instruments are ordered to be given up, or a deed to be cancelled as being a *cloud* on the title.³

IV. **Bills of account** were resorted to because of the inadequacy of the common-law remedy. Equitable jurisdiction is exercised chiefly in three cases.⁴

1. In *mutual* accounts. At common law it was practically impossible to investigate a mutual account with a jury.

2. In *complicated* accounts.

3. When there is a *fiduciary* relation existing between the parties. Having jurisdiction over such parties in other relations, equity naturally assumed jurisdiction in matters of account.

No bill in equity can be brought on an *account stated*. Here the common-law remedy is sufficient.⁵

To *surcharge* an account is to show that a proper credit has been omitted. To *falsify* an account is to show that an improper charge has been inserted.⁶

V. **A creditors' bill** is a bill filed by creditors for the purpose of collecting their debts out of property

¹ Bisph. Eq. § 467.

² Tied. Eq. § 506.

³ Id. § 508.

⁴ Bisph. Eq. § 484; 3 Pom. Eq. Juris. § 1421.

⁵ Bisph. Eq. § 485.

⁶ Id. § 486, citing *Pit v. Cholmondeley*, 2 Ves. Sr. 565.

of the debtor which cannot be reached at common law.

Judgment creditors alone can resort to a creditors' bill. By this bill, equitable property belonging to the debtor may be reached, and also property transferred for the purpose of defrauding creditors. It must be shown that the creditor has *exhausted his common-law remedy*. This is done by alleging and proving that he has obtained judgment, and that execution has been taken out and returned unsatisfied.¹

VI. A bill of discovery is one brought to compel a defendant to disclose facts within his knowledge, or to produce instruments in his possession, in order to maintain the right or title of the party bringing the bill, in some proceeding in another court. At common law, no party in interest could give evidence in a suit, and as it frequently happened that the plaintiff's case depended upon facts or documents in the knowledge or possession of the defendant, equity was resorted to through a bill of discovery to obtain the needed information. With the change in the common-law rules of evidence, bills of discovery have largely fallen into disuse.²

VII. Partnership bills are bills brought for the dissolution of a partnership, the protection of its property, an account, and a distribution of the assets. None of these ends can be fully or satisfactorily obtained at law; hence equity has assumed jurisdiction in matters pertaining to the dissolution and winding up of partnerships.³

VIII. Bills *quia timet* are bills brought to prevent wrongs or anticipated mischiefs.⁴ The remedy given depends upon the circumstances of each case. Thus, if a fund in the hands of trustees is likely to be squan-

¹ Bisph. Eq. § 575 *et seq.*

² Id. § 556 *et seq.*; 2 Story Eq. Juris. § 688 *et seq.*

³ Id. § 505 *et seq.*

⁴ 2 Story Eq. Juris. § 826.

dered or diverted from its original object, equity will remove the trustees and appoint others. Other cases may require the appointment of a receiver, or the granting of an injunction, as against the commission of waste.¹ **BILLS TO QUIET TITLE** are classed among bills *quia timet*. Thus, if a title is clouded by any instrument, whether of record or not, which has become inoperative, equity will decree its cancellation.²

IX. Bills of peace are bills filed to prevent the recurrence of litigation by a numerous class insisting on the same right, or to prevent the same person from prosecuting anew an unsuccessful claim.³ In the first case, the court makes up an issue to determine the right, and this determination is conclusive on all parties. In the second case the court issues an injunction against further litigation of the claim. This course was resorted to most frequently in the action of ejectment. Here a decision at common law in favor of the apparent plaintiff did not prevent recourse to the action again by the actual plaintiff. Hence, when the title to land was tried five times by ejectment, with the result in favor of the defendant each time, the court granted a perpetual injunction against further litigation of the claim.⁴

X. Bills of interpleader are bills filed by a third person, who, not knowing to whom he ought to render a debt or a duty, and fearing that he may be injured by some of the claimants, asks that they may be directed to *interplead*, so that the court may decide to whom the debt or duty should be rendered.⁵ Thus, if A deposits money with B, and C then claims to be the owner of the money, B is not compelled to pay the

¹ 2 Story Eq. Juris. § 826.

² Bisph. Eq. § 575.

³ See Id. § 415 *et seq.*; 2 Story Eq. Juris. § 852 *et seq.*

⁴ Earl of Bath *v.* Sherwin, Prec. Ch. 261.

⁵ Bouv. Law Dict. and authorities cited.

money to either A or C, but can file his bill of interpleader to have the ownership of the money determined as between A and C.

XI. **Bills to take testimony *de bene esse*** are bills brought to take the testimony of a witness to a fact material to the prosecution of a suit at law *which has been commenced*, and when there is reason to fear that otherwise the testimony may be lost before the time of trial. This was resorted to when the witness was old or infirm, or was about to leave the country, or when there was but *one* witness to the fact.¹ This bill has fallen into disuse through the power given to common-law courts to take testimony through interrogatories.

Bills to perpetuate testimony are bills to preserve testimony which is in danger of being lost *before the matter to which it relates can be made the subject of a trial*. They differ from bills *de bene esse* in that in the latter legal proceedings have been begun.²

¹ 2 Story Eq. Juris. §§ 1513, 1514.

² Id. § 1505.

CHAPTER XXIX.

PLEADING.

An action is a lawful demand of right.¹ Actions are divided into classes.

1. *Criminal* actions.
2. *Civil* actions.

Civil actions are divided into two classes.

1. *Legal* actions.
2. *Equitable* actions.

Legal actions are divided into three classes.

1. *Real* actions.
2. *Personal* actions.
3. *Mixed* actions.

1. Real actions are those which are brought for the specific recovery of lands, tenements, or hereditaments. Mixed actions are such as partake of the nature of both real and personal actions, as those brought both for the specific recovery of lands, etc. and for damages sustained in respect to such property.²

By statute 3 and 4 William IV. (1833-34), all real and mixed actions were abolished, with the exception of four.³

(a). *Writ of right of dower*, resorted to by a widow to obtain a *specific* portion of her dower, part of it having been already received.

(b). *Writ of dower*, resorted to by a widow to obtain her dower, no portion having as yet been assigned to her.

(c). *Writ of quare impedit*, resorted to by a person

¹ 3 Bl. Comm. 116.
(184)

² Steph. Pl. *4.

³ Id. *4, *9 *et seq.*

who has been presented to a benefice, but whose possession is prevented or obstructed.

(d). *Ejectment*. This was originally a personal action resorted to by a tenant for years, to recover damages for ouster from the property leased to him. Owing to the intricacy, technicality, and delay incident to the ancient real actions, the action of ejectment was resorted to as a means of *trying title* to land. For, in this action, in addition to giving a judgment for damages, the court also determined that the ousted tenant should recover *possession* of the lands.

As originally resorted to as a means of trying title, the procedure was as follows: A, who is out of possession of lands which are in the possession of D, and to which he claims title, makes a lease for years of the lands to B. B enters and is ousted, or put off the land by D. If not ousted by D, C, who is brought along for the purpose, and who is called the *casual ejector*, ousts the lessee, B. B then begins an action of ejectment against D, or, if ousted by C, against C. In the latter case C gives notice to D that he, C, has ousted B, that he had no right to do so, as he had no title to the land, and that D must appear to defend his title, or B will recover judgment for the lands. D appears, and the lease to B, his entry and ouster being proved, the only remaining question was that of title, namely, whether A could give a valid lease of the lands in question to B.

In course of time, these proceedings became largely fictitious. There was no *actual* lease, entry, or ouster. B, the lessee, and C, the casual ejector, were imaginary parties. An action of ejectment was begun by B, the imaginary lessee, against C, the imaginary ejector, in which the making of a lease by A, the real claimant, entry by B, and ouster by C are alleged in the declaration. D, through the attorneys of the real plaintiff A,

is notified, in the name of C, of the beginning of the action, and is advised to appear and defend. Before he was allowed to appear, however, he must, by a rule of court, *admit* the *lease*, the *entry*, and the *ouster*, and thus can only deny the *title* of A.¹

This action is no longer in use. The method of proceeding in ejectment is regulated by statute.

2. **Personal actions** are those which are brought for the specific recovery of goods and chattels, or for damages for breach of contract, or for damages arising from other injuries.² They are divided into two classes.³

A. Actions *ex contractu*.

B. Actions *ex delicto*.

A. Actions *ex contractu* are those arising from a breach of contract. They are of three kinds.

(a). *Assumpsit*.

(b). *Debt*.

(c). *Covenant*.

(a). *Assumpsit* is the action brought for the recovery of damages for the breach of a *simple* or *parol* contract. *Assumpsit* is of two kinds.

(1). *Special*, or *assumpsit* brought on an *express* contract.

(2). *General*, or *assumpsit* brought on implied contracts in certain cases.⁴ The grounds of action on a general *assumpsit* usually fall under one of four *common counts*, namely:⁵

[1.] *Indebitatus assumpsit*, where the plaintiff alleges a debt and a promise of payment made in consideration of the debt, the promise being an *implied* promise.

[2.] *Quantum meruit*, where the plaintiff sues to recover for services rendered, *as much as he deserved*.

¹ See 3 Bl. Comm. 300; Steph. Pl. *11.

² Steph. Pl. *3.

³ Heard Civ. Pl. 23.

⁴ Bouv. Law Dict., sub. *Assumpsit*, and authorities cited.

⁵ Id., sub. *Common Counts*; see 3 Bl. Comm. 160.

[3]. *Quantum valebat*, where the plaintiff sues to recover for goods sold and delivered, *as much as they were worth*.

[4]. *Insimul computassent*, where the plaintiff sues to recover for the *balance of an account*.

In these four cases, the contract is *implied* and not expressed in terms by the parties. Thus, if A did work for B, without any express contract, but B allowed A to work for him without remonstrance and availed himself of the results of his labor, A would sue B on an *assumpsit quantum meruit*. If A ordered goods of B, and there was no agreement in regard to the price, B would sue A to recover their value in *assumpsit quantum valebant*.

(b). **Debt** was an action which lay where there was a *liquidated i. e.*, certain sum due. Unless the *exact* sum alleged in the declaration to be due was proved to be due, the plaintiff recovered nothing. Thus, if A, suing in debt, alleged ten pounds as the amount due, but proved a claim of only nine pounds, judgment was for the defendant.¹

(c). **Covenant** was the action brought to recover damages for breach of contract *under seal*.²

B. Actions *ex delicto* are those which are brought to recover damages resulting from a *tort*. They are of four kinds.

(a). *Trespass*.

(b). *Trover*.

(c). *Replevin*.

(d). *Case*.

(a). Trespass is the action which lies for the recovery of damages arising from a trespass.³ (For trespass see page 152.)

(b). Trover lies to recover damages against one who

¹ Steph. Pl. *14; 3 Bl. Comm. 154.

² Id. 156.

³ Steph. Pl. *16.

has, without right, *converted* to his own use, goods in which the plaintiff has a *general* or *special* property.

This action originally lay against a person who had *found* goods and who refused to restore them to their rightful owner. Hence the name *trover* (to find). This action *differs from trespass* in that the injury is *not necessarily forcible*, and from *replevin* in that the action is for *damages*, and *not to recover possession* of the specific article.

The measure of damages is the value of the property at the time of conversion, with interest. A demand for the surrender of the goods is necessary to sustain an action of *trover*.¹

(c). **Replevin** lies to regain the possession of personal property which has been taken from the plaintiff unlawfully. It was originally resorted to to recover possession of chattels which had been taken by *distress* (the taking of a chattel from a wrong-doer into the custody of the party injured to procure satisfaction for the wrong done: usually resorted to as a means of collecting rent due). It may now be used in *all* cases of illegal taking.²

(d). **Case** (trespass on the case) is the action brought to recover damages when the other actions *ex delicto* do not lie, as in the case of injuries not committed with force, such as libel, or of forcible injury to an intangible right, such as the obstructing of a way, or when the tort is committed forcibly, but the injury is consequential, and not immediate. Thus, if A drops a log on the foot of B, the proper action for the injury is *trespass*; but if A negligently leaves a log in B's way, over which he falls, the proper action is *trespass on the case*.

The action arose from statute Westminster 2nd (13

¹ 3 Bl. Comm. 152; Bouv. Law Dict.; 2 Chit. Pl. 618 (16th Am. Ed.); 1 Id. *176.

² 3 Bl. Comm. 145; Bouv. Law Dict.; 2 Chit. Pl. 591 (16th Am. Ed.).

Edward I., 1287), which provided that if any cause of action arose for which there was no remedy, a *new writ* was to be framed by the clerks of chancery analogous to those already in existence, which were adapted to similar causes of action (*in consimili casu*).¹

ACTIONS (HOW COMMENCED).

Actions, at common law, were ordinarily commenced by *writ and summons*.

A **writ** is a mandatory precept or letter, issued by a court of competent jurisdiction, addressed to the sheriff of the county where the injury is alleged to have been committed, containing a condensed statement of the cause of complaint, and requiring him to command the defendant to satisfy the claim, and on his failure to comply, to summon him to appear in the court from which the writ was issued to account for his non-compliance.²

The **summons** contains substantially the same matter as the writ, and is served on the defendant personally, or by leaving it at his last usual place of abode. The writ and summons state the time at which the defendant is to appear in court, and this time is called the *return day* of the writ.

On the **return day**, the plaintiff *enters the writ*,—i. e., deposits it with the clerk of the court from which it was issued, by whom the suit is entered on the records of the court. On the return day, or within a certain time thereafter, the defendant must *appear*, either in person or by counsel.

The **appearance** consists in requesting the clerk to enter on the records the attorney's appearance for the defendant. If the defendant fails to appear within the

¹ See Bouv. Law Dict., sub. Case; Steph. Pl. *17; 3 Bl. Comm. 122;

² Chit. Pl. *142 (16th Am. Ed.).

² See Burrill Law Dict.; Gould Pl. 15; Heard Civ. Pl. 19.

proper time, he is *defaulted*, and judgment entered for the amount claimed by the plaintiff. On the entry of the case by the plaintiff and the appearance by the defendant the *pleadings* begin.¹

¹ See Heard Civ. Pl. 33, 34. Consult works on Local Practice.

CHAPTER XXX.

THE PLEADINGS.

The pleadings consist of

1. The *Declaration*.
2. The *Demurrer* or *Plea*.
3. The *Replication*.
4. The *Rejoinder*, *Surrejoinder*, *Rebutter*, *Surrebutter*, etc.

1. The declaration is a statement of the plaintiff's cause of action.¹

2. If, assuming the plaintiff's allegations to be true, the defendant thinks that, as a matter of *law*, there is no ground for action, he *demurs* to the declaration,—*i. e.*, declines to proceed further until it has been decided whether, as a matter of law, the plaintiff is entitled to any relief. A demurrer thus raises an *issue of law*. An *issue is a point affirmed on one side and denied on the other*.²

Demurrers, as regards their nature, are of two kinds.

(a). Demurrers to *matters of substance*.

(b). Demurrers to *matters of form*.

Demurrers, as regards their form, are of two kinds.

(a). *General*, or those excepting to the sufficiency of the declaration in general terms.

(b). *Special*, or those specifying the particular ground of exception.

A general demurrer is sufficient to a matter of *substance*; a special demurrer is necessary to a matter of *form*.³

¹ Steph. Pl. *29.

² Bouv. Law Dict.

³ Steph. Pl. *44, *140.
(191)

If the defendant does not demur, he is obliged to answer the declaration by some matter of *fact*. In so doing he is said to *plead*. *A plea is the defendant's answer by matter of fact.*¹

Pleas are divided into two classes.

A. Dilatory pleas.

B. Peremptory pleas.

A. Dilatory pleas are those tending to defeat the action on the ground that it is brought before the wrong court, or by or against the wrong persons, or in an improper form.

Dilatory pleas are divided into three classes.

(a). Pleas to the *jurisdiction*, by which the defendant excepts to the jurisdiction of the court.

(b). Pleas *in suspension of the action*, which show some ground for not proceeding in the suit at present, such as the *excommunication* of the plaintiff.

(c). Pleas *in abatement*, or those showing some matter of fact tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but which does not debar the plaintiff from recommencing it in a different way. Among the pleas in abatement, six are most important.²

[1]. *Coverture* of the plaintiff.³

[2]. *Death* of the plaintiff either before or during the commencement or pendency of the suit.⁴

[3]. *Infancy* of the plaintiff, unless he appears by guardian or next friend.⁵

[4]. *Misjoinder*, or the joinder of improper plaintiffs.⁶

[5]. *Non-joinder* of all the parties interested, either as plaintiffs or defendants.⁷

[6]. *Misnomer* of either plaintiff or defendant.⁸

¹ Steph. Pl. *45 *et seq.*

² Bouv. Law Dict., sub. Abatement.

³ 1 Chitty Pl. 439.

⁴ 1 Arch. Civ. Pl. 304.

⁵ 3 Bl. Comm. 301.

⁶ 1 Chit. Pl. 8.

⁷ 1 Arch. Civ. Pl. 309; 1 Chit. Pl. 12.

⁸ Id. 451.

B. Peremptory pleas, or pleas *in bar*, are those which deny that the plaintiff has any cause of action. They are divided into two classes.¹

(a). *Traverses*, or pleas which deny all, or some essential parts of the averments of fact contained in the declaration.

(b). Pleas *by way of confession and avoidance*, which, while admitting the averments of the declaration, allege new facts which obviate or repel the legal effect of the averments of the declaration. Such a plea, in an action to recover damages in trespass, would be a *release*, or *payment*.

A traverse at once raises an *issue of fact*.

3. If the defendant makes a *dilatory* plea, or a plea *by way of confession and avoidance*, the plaintiff can *demur* to the plea, or, in turn, can *plead* to it by a traverse, or by way of confession and avoidance.

Such pleading on the part of the plaintiff is called the *replication*.²

4. A replication by way of *demurrer* or *traverse* results in an issue; but if it be by way of confession and avoidance, the defendant can, in his turn, demur, or plead a traverse, or by way of confession and avoidance, to the plaintiff's replication. *Such pleading* by the defendant is called the *rejoinder*. In the same way the defendant's rejoinder may be followed by the plaintiff's *surrejoinder*, the plaintiff's surrejoinder by the defendant's *rebutter*, the defendant's rebutter by the plaintiff's *surrebutter*, etc.

This is the simple and direct course which the pleading takes. It is sometimes varied by pleas *puis darreign continuance*. These are pleas put in after issue has been joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequent to the joinder of issue.

¹ Steph. Pl. *52 *et seq.*

² Id. *58 *et seq.*

The words "puis, etc.," mean "since the last continuance." By an ancient practice, when an adjournment of the proceedings occurred for any purpose, an entry was made stating when the parties were to come into court again, and these entries were called *continuances*. Therefore a plea, setting forth any matter arising since the last continuance, was given this name. Such a plea would be that of a *release* given by the plaintiff since the beginning of the action.¹

Demand of oyer occasionally arises in the course of pleading.²

When either party to an action alleges any *deed*, he is obliged to make *profert* of it,—*i. e.*, produce it in court with the pleading in which it is alleged. When the pleading was *oral*, the deed was actually produced in court. When the pleadings were embodied in writing, to make *profert* was merely to allege that the party showed the deed in court, it being actually retained in his own custody. When *profert* is thus made, the other party, before he pleads, can demand oyer,—*i. e.*, can demand to hear the instrument read. When the pleadings were oral, the deed was actually read. Now the practice is for the party demanding oyer to send a note to the attorney of the party making *profert*, containing the demand. On this, the latter is obliged to give the former a copy of the deed.

When the parties are at an issue of fact, the steps in the proceedings are as follows:

1. The *trial*.
2. The *verdict*.
3. Means resorted to *for setting aside the verdict*.
4. *Judgment*.
5. *Execution*.

1. **The trial** is the decision of the question of fact.

¹ Steph. Pl. *64 ; 2 Chit. Pl. *688 (16th Am. Ed.).

² Steph. Pl. *66 *et seq.*

There are four methods of trial at common law, the first of which only is in common use.¹

(a). Trial by *jury*.

(b). Trial by *the record*.

(c). Trial by *certificate*.

(d). Trial by *witnesses*.

(b). Trial by record is resorted to when the issue is the existence of a record. Here the question is determined by an examination of the record by the court.

(c). Trial by certificate was used chiefly in the action of dower, in which the tenant may plead that the demandant "was never accoupled to her alleged husband in lawful matrimony." On this issue, the court directed that it be tried by the *diocesan* of the place where the church in which the marriage was alleged to have taken place was located, and that the result be *certified* to the court at an appointed day.

(d). Trial by witnesses was used in issues arising on the death of the husband in actions of dower. The court directed that both parties produce their witnesses in court, when they were examined by the judges, who decided the issue without the intervention of a jury.

2. **The verdict** is the unanimous decision made by a jury and reported to the court, on the matters lawfully submitted to it in the trial of a cause. Verdicts are of two kinds.²

(a). *General*, by which the jury pronounces either in favor of the plaintiff or defendant.

(b). *Special*, in which the jury finds that certain facts exist, and leaves the application of the law, and the conclusion to be drawn from these facts, to the court.

3. Upon the rendering of the verdict, the party against whom it is given may resort to one or more of five measures to avoid its effect.³

¹ Steph. Pl. *77 *et seq.*

² Bouv. Law Dict.

³ Steph. Pl. *94 *et seq.*

(a). He may move for a *new trial* on one of six grounds.

[1]. That the judge *misdirected the jury*.

[2]. That the judge *admitted or rejected evidence contrary to law*.

[3]. That the verdict was *contrary to the evidence* and the weight of the evidence.

[4]. That a *new and material fact* has come to light since the trial.

[5]. That the damages are *excessive*.

[6]. That the jury was *guilty of misconduct*, such as casting lots to determine its verdict.

(b). The defendant may move *in arrest of judgment*,—*i. e.*, that judgment for the plaintiff be withheld, on the ground that there is some error appearing on the *face of the record*. The defect must be one of *substance*, and not of form merely.

(c). The plaintiff may, in some cases, move for judgment, *non veredicto obstante*,—*i. e.*, without regard to the verdict. This motion is made when the plaintiff, on a re-examination of the pleadings, conceives some of the pleadings of the defendant to be bad in *substance*, which might have been made the subject of demurrer. The verdict, having merely decided that the plea was true in point of fact, the insufficiency of the plea in point of law is not affected thereby, and the question of insufficiency can be raised by this motion.

(d). A motion *for a repleader* may be made when the defeated party conceives that the issue joined and decided by the verdict was an *immaterial* issue.

(e). The defeated party may move for a *venire facias de novo* (the name of the writ by which jurors are summoned to attend), when, because of some irregularity or defect in the proceedings on the first *venire*, or on the trial, the proper effect of the writ (*venire facias*) has been frustrated, or the verdict become void in law; as

when the jury has been improperly chosen, or has given a defective verdict. The effect of the motion, if granted, is practically that of a motion for a new trial.

4. **Judgment** is the sentence of the law, pronounced by the court, as a result of proceedings instituted for the redress of an injury.¹ The nature of the judgment depends wholly upon the nature of the issue and its decision by the jury.

5. On the rendering of judgment in favor of the plaintiff, he is entitled to an *execution* against the defendant. An execution is a writ which directs and authorizes the officer to carry into effect the judgment. It directs him to take possession of the property of the defendant (and in some cases, in want of property, to arrest the defendant and commit him to jail) and sell the same for the satisfaction of the judgment.²

If, upon an examination of the whole record, it appears that judgment has been given for one of the parties, when it ought to have been given for the other, this constitutes *error in law*. The remedy is a *writ of error*, requiring that the record be sent to a court of appellate jurisdiction, that the error may be corrected. The error must be one of *substance*, however, and not merely of form.³

¹ 3 Bl. Comm. 305.

² Bouv. Law Dict.

³ Steph. Pl. *119.

CHAPTER XXXI.

RULES OF PLEADING.

THE rules which govern pleading may be divided into seven classes.

1. Those tending to the *production* of an issue.
2. Those tending to produce a *material* issue.
3. Those tending to produce a *single* issue.
4. Those tending to produce a *certain* issue.
5. Those tending to prevent *obscurity* and *confusion*.
6. Those tending to prevent *prolixity* and *delay*.
7. Certain miscellaneous rules.

1. There are three rules in this class.¹

(a). After the declaration, the parties at each stage must *demur*, or *plead*, either by way of traverse or of confession and avoidance.

(b). Upon a traverse, *issue* must be tendered.

(c). When issue is tendered, *it must be accepted*.

2. In this class the general rule is that all pleadings must contain matter *pertinent* and *material*.

Among the special rules, two are especially important.²

(a). A *traverse* must *not* be taken on an *immaterial* point.

(b). A traverse must not be *too large*, or too narrow,—*i. e.*, a traverse of an allegation should take in no more of that allegation than is material, nor should it omit any material portion of the allegation.

3. Two rules are of chief importance.³

(a). Pleadings must not be *double*. This rule, as

¹ Steph. Pl. *137 *et seq.*

² Id. *240 *et seq.*

³ Steph. Pl. *251 *et seq.*

applied to the declaration, means that it must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. In regard to the subsequent pleadings, the rule means that none of them is to contain several distinct answers to the pleading which precedes it.

The effect of this rule is qualified by allowing the plaintiff to unite several counts in the same declaration. Consequently the defendant can offer different pleas, according to the nature of the different counts.

As a rule, the plaintiff can join, in one declaration, claims arising *ex contractu*, such as a debt on a bond and a debt on a simple contract, and claims arising *ex delicto*, as in the case of several trespasses; but claims *ex contractu* and *ex delicto*, as a debt and a trespass, cannot be joined.¹

The parts of the declaration in which the different causes of action are stated, are called *counts*.

(b). It is *not* allowable to *plead* and *demur* to the same matter.

4. In this class there are seven rules.²

(a). The pleadings must have certainty of *place*,—*i. e.*, the *venue* of the action, namely, the *county* in which it is to be tried, must be stated in the declaration.

Actions, with regard to venue, are divided into two classes.³

(1). *Local*, or those the cause of which could have arisen in some particular county only, as any of the *real* actions.

(2). *Transitory*, or those the cause of which might have arisen anywhere.

In local actions, the venue must be *truly laid*,—*i. e.*, the action must be brought in the county where the cause of action arose.

¹ 1 Chit. Pl. *221 *et seq.* (16th Am. Ed.).

² Steph. Pl. *279.

³ Id. *289.

In transitory actions, the venue may be laid in whatever county the plaintiff chooses. The matter of venue is now largely regulated by statute.

(*b*). The pleadings must have certainty of *time*. In personal actions, the day, month, and year when each traversable fact occurred must be alleged.

As a rule, the time is not regarded as being material to the issue, so that the pleader is not obliged to *prove* the time as alleged.

(*c*). The pleadings must specify *quality*, *quantity*, and *value*.

(*d*). The pleadings must specify the *names* of parties.

(*e*). The pleadings must show *title* in the party bringing the suit.

(*f*). The pleadings must show *authority*,—*i. e.*, when a party justifies under a writ, warrant, or precept, or any other authority whatever, he must set it forth particularly in his pleadings.

(*g*). In general, *whatever* is alleged in pleading, must be alleged with certainty.

5. There are eight rules in this class.¹

(*a*). Pleadings must not be *insensible*, or *repugnant*,—*i. e.*, they must be intelligible, and consistent with themselves.

(*b*). Pleadings must *not be ambiguous*, or doubtful in meaning, and when two constructions present themselves, that one shall be adopted which is most unfavorable to the party pleading.

(*c*). Pleadings must not be *argumentative*,—*i. e.*, they must state the facts in an *absolute* form, and not leave them to be collected by inference and argument.

(*d*). Pleadings must not be *hypothetical*, or in the *alternative*.

(*e*). Pleadings must not be by way of *recital*, but must be positive in form.

¹ Steph. Pl. *377.

(*f*). Things are to be pleaded according to their *legal* effect and operation.

(*g*). Pleadings should have their proper formal commencements and conclusions.

(*h*). Pleading which is bad in part is bad altogether.

6. There are three rules under this class.¹

(*a*). There must be no *departure* in the pleadings. A departure occurs when, in any pleading, the party deserts the ground which he took in the last antecedent pleading, and resorts to another.

(*b*). When a plea amounts to the *general issue*, it should be so pleaded.

(*c*). *Surplusage* is to be avoided. By surplusage is meant *unnecessary matter* of whatever description.

7. There are seven rules in this class.²

(*a*). The *declaration* must be conformable to the *writ*.

(*b*). The declaration should have its *proper commencement*, and should, in conclusion, lay *damages*.

(*c*). Pleas must be pleaded in *due order*.

(*d*). Pleas in *abatement* must give the plaintiff a better writ, or declaration,—*i. e.*, the plea must correct the mistake of the plaintiff so as to enable him to avoid the same mistake in framing a new writ, or declaration.

(*e*). *Dilatory* pleas must be pleaded at a preliminary stage in the suit.

(*f*). In all pleadings *where a deed is alleged* under which the party claims or justifies, *profert* of such deed must be made.

(*g*). All pleadings ought to be *true*.

¹ Steph. Pl. *410 *et seq.*

² Id. *426 *et seq.*

CHAPTER XXXII.

PLEADING IN EQUITY.

Pleading in equity is begun by a *bill*, which is a complaint addressed to the Chancellor, containing the names of the parties, a statement of the facts on which the plaintiff relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and for proper process.¹

A bill in equity usually consists of nine parts.²

1. The *address* to the court having jurisdiction.
2. *Names* of the plaintiffs.
3. *Statement* of the plaintiffs' case.
4. A *general charge* of confederacy on the part of the defendants.
5. *Allegations* of the pretences of the defendants.
6. Clause of *jurisdiction*.
7. *Prayer* that the defendants may answer the plaintiffs' interrogatories.
8. Prayer for *relief*.
9. Prayer for *process*.

Upon the filing of the bill, a writ of *subpœna* is issued against the defendants, commanding them to appear and answer the plaintiffs' interrogatories, and to submit to such a decree as the court may make.

Defence.—The forms of defence are four.³

1. *Disclaimer*, which denies that the defendants have any interest in the matter.

¹ Adams Eq. *301 *et seq.*

² Mitf. Pl. 49 (5th Ed.).

³ Adams Eq. *332.

2. *Demurrer*, as in pleading at law.

3. *Plea*, which avers some matter of avoidance, or denies some one allegation of the bill, and rests the defence on that issue.

4. *Answer*, which puts on record the whole case of the defendants, whether by way of demurrer, of avoidance, or of denial, and raises one or more issues, as the case may be.

At the hearing of the cause, the pleadings and evidence are offered, and the court makes its decree. If the defendant *appears*, it is an ordinary decree. If he does not appear at the *hearing*, it is a decree *by default*. If he has never appeared in the suit, or if, after appearing, he has neglected to *answer*, it is a decree *pro confesso*.¹

RULES OF PLEADING.

There are four chief rules of pleading relative to the bill.

1. It must state a *consistent case* on behalf of *all* the plaintiffs; otherwise the *misjoinder* will be fatal to the suit.²

2. It must state the case in *direct* terms, and with reasonable *certainty*.³

3. The *relief* asked should be pointed out with *reasonable clearness*.⁴

4. The bill should not be *multifarious*. Multifariousness is of two kinds.⁵

(a). When the plaintiff has *several distinct claims* against the same defendant and prays relief, *in a single suit*, in regard to all.

(b). When a plaintiff, having a valid claim against *one defendant*, joins *another* person as defendant in the same suit, with a large part of which he is *unconnected*.

¹ Adams Eq. *331.

² Id. *302.

³ Id. *303 and note.

⁴ Id. *309.

⁵ Id. *309 *et seq.*

There are five chief rules of pleading in regard to the *defence*.¹

1. The *plea* must raise a *single* issue.
2. The averments of a plea must have the same *certainty* as those of a plea at law.
3. The plea *must be verified* by the defendant's oath.
4. In case an *answer* is filed, which is the ordinary proceeding, it must state the defendant's case in *direct* terms and with reasonable *certainty*, and must answer on oath as to all facts material to the plaintiff's case.
5. The defendant must answer *distinctly* and *completely*, without needless *prolixity*, and to the best of his *information* and *belief*.

ADDITIONAL BILLS.

Five bills in equity, as having special reference to pleading in equity, are mentioned here.

1. A *bill of revivor* is a bill brought to continue a suit which has *abated* before its consummation, as by death of a plaintiff.²

2. A *bill of review* is one brought to have a decree of the court reviewed, altered, or reversed. It must be brought on one of two grounds.³

(a). For *error in point of law*.

(b). For *some new matter of fact*, discovered since the decree, and which could not, with reasonable diligence, have been discovered before.

3. A bill *in the nature of a bill of revivor* is used when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in a court of equity.⁴

4. A *supplemental bill* is one brought in addition to

¹ Adams Eq. *340, *342, *344.

² Mitf. Ch. Pl. 83; Story Eq. Pl. § 369.

³ Id. §§ 403, 404.

⁴ Id. § 377, 378.

the original bill, to supply some defect which cannot be remedied by *amendment*.¹

5. A bill *in the nature of a supplemental bill* is resorted to when the interest of the plaintiff or defendant wholly terminates, and the same interest rests in another person not claiming under him.²

¹ Story Eq. Pl. § 332.

² Id. § 345.

CHAPTER XXXIII.

EVIDENCE.

Evidence includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved.¹

Proof denotes the *effect* produced by evidence.

There are seven so-called *instruments of evidence*,—*i. e.*, means through which evidence is obtained.²

1. *Judicial notice*. Courts take notice of many things without the introduction of evidence regarding them, such as the extent of their own jurisdiction, the local divisions of their own countries, etc.

2. *Public records*, as the statutes.

3. *Judicial writings*, as depositions.

4. *Public documents*, such as those printed by the authority of Congress.

5. *Private writings*, as deeds and wills.

6. *Testimony* of witnesses.

7. *Personal inspection* by a jury, as when a view of a locality is taken.

Evidence may be divided into three classes.³

I. *Direct* evidence.

II. *Circumstantial* evidence.

III. *Presumptive* evidence.

I. Direct evidence is that means of proof which tends to show the existence of a fact, *without the intervention of any other fact*,⁴ as when A testifies that he saw B strike C.

¹ 1 Greenl. Ev. § 1.

² Bouv. Law Dict., sub. Evidence.

³ 1 Greenl. Ev. §§ 13, 14.

⁴ Bouv. Law Dict., sub. Evidence.

II. Circumstantial evidence is that means of proof which tends to *prove a disputed fact*, by proof of *other facts* which have a legitimate tendency to lead the mind to the conclusion that the fact which is sought to be proved does exist.¹ Thus, if the tracks of a horse are found in the snow, this circumstance furnishes grounds for concluding that a horse has at some time passed over the road. Presumptive evidence is sometimes used as synonymous with circumstantial, but all presumptive evidence is not circumstantial, as many presumptions arise from arbitrary rules, not as logical inferences.

Circumstantial evidence is of two kinds.²

1. *Certain.*
2. *Uncertain.*

1. Certain circumstantial evidence is such that the fact sought to be established *necessarily* follows from it: thus, if a body be found, with a knife in the heart, the conclusion that death resulted from violence is certain.

(2). Uncertain circumstantial evidence is such that the fact sought to be established does *not necessarily* follow from it: thus, in the case just mentioned, the fact that the man was murdered would not necessarily follow from the knife's being in the heart.

III. Presumptive evidence is that means of proof which shows the existence of one fact by proof of the existence of others from which the existence of the first fact may be inferred.³

Presumptions are divided into two classes.⁴

1. *Presumptions of law.*
2. *Presumptions of fact.*

1. Presumptions of law are those which arise in certain cases by force of the *rules of law*, which direct an inference to be drawn upon the proof of certain facts.

¹ Bouv. Law Dict.; see 1 Starkie Ev. 478. ² 1 Greenl. Ev. § 13a.

³ Bouv. Law Dict., sub. Evidence.

⁴ 1 Greenl. Ev. § 14 *et seq.*

Presumptions of law are divided into two classes.

(a). *Indisputable* presumptions.

(b). *Disputable* presumptions.

(a). Indisputable presumptions are those which admit of *no averment* or proof *to the contrary*, as that a man is supposed to contemplate the natural consequences of his own acts, or that an infant under the age of seven cannot commit a felony.

(b). Disputable presumptions are those in consequence of which a fact *is inferred* as existing, until something is offered to show *the contrary*, as that a man is presumed to be innocent until he is proved to be guilty, sane until proved insane, etc.

2. Presumptions of fact are the natural presumptions which appear, from common experience, to arise from the particular circumstances of any case.¹ Such a presumption would be the inference of guilt drawn from finding a knife with a broken blade in the pocket of a prisoner, if the other part of the blade was found sticking in the window of a house which had been entered through the window in question.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

There are four general rules under this head.²

I. *The evidence must correspond to the allegations and be confined to the point at issue.*

II. *It is sufficient if the substance of the issue be proved.* It follows that any departure from the substance in the evidence introduced is fatal. Such a departure is termed a *variance*,³—i. e., a disagreement between the allegations and the proof, in some matter which, in point of law, is essential to the support of the charge or claim.

III. *The obligation of proving any fact lies upon the*

¹ Bouv. Law Dict., sub. Evidence; 1 Starkie Ev. 27.

² 1 Greenl. Ev. § 50 *et seq.*

³ Id. § 63; 2 Rice Ev. 660.

party who asserts the affirmative of the issue,—i. e., the burden of proof lies upon the party holding the affirmative.

IV. *The best evidence must be produced.* This rule leads to another division of evidence into ¹

1. *Primary* evidence.
2. *Secondary* evidence.

1. Primary evidence is the *best possible* evidence. Thus, the best evidence of a contract in writing is the writing itself.

2. Secondary evidence includes all evidence other than primary, as *parol* evidence of the contents of a written instrument.

Rule IV. is applied most frequently to cases relating to the *substitution of oral for written evidence*. These cases are divided into three classes.²

1. Cases relating to instruments required by *law* to be in writing, such as records, deeds for the conveyance of land, and other contracts required to be in writing by the statute of frauds. In these cases *oral* evidence *cannot* be substituted for the written evidence required by law so long as the writing exists.

2. Cases relating to *contracts* which the parties have put *in writing*. The rule here is that the writing must be produced, or the impossibility of producing it be shown, before oral evidence can be introduced to show what its contents are.

Oral evidence can be introduced to explain written contracts, but not to contradict, vary, or add to that contained in the written instrument. This rule applies only to *parties* and *privies*, however, not to strangers.³ Thus, parties to a conveyance under seal, which states a consideration, cannot deny that there is a consideration,

¹ 1 Greenl. Ev. § 84.

² Id. § 85.

³ 1 Greenl. Ev. §§ 275, 279; see 1 Rice Ev. 254 *et seq.*, and cases cited.

though it may be shown that the *actual* consideration differs from that stated in the conveyance. Third parties, however, who are not privies, can show that there was no consideration.

There is a *striking exception* to this rule excluding parol evidence, in the case of a conveyance, *absolute* in form, which is yet intended by the parties to have the force of a *mortgage*. In equity, the party making the conveyance can show that the conveyance was intended to operate as a mortgage, and upon tendering the amount due, can compel a re-conveyance.¹

The rule does not prevent parties from showing that a written contract has been *waived* and a different oral contract subsequently substituted in its stead.²

Ambiguities in written contracts are of two kinds.

(a). *Patent*.

(b). *Latent*.

(a). Patent ambiguities are such as *appear upon the face of the instrument*, as in a grant in which no grantee is named.

(b). Latent ambiguities are such as *arise from some collateral matter*, and do not appear upon the face of the instrument: as if A grants to B a farm lying in the county of C—, and it appears that A has *two* farms in that county. *Latent ambiguities may be explained by parol evidence; patent ambiguities cannot be so explained.*³

A receipt is not a contract, nor necessarily evidence of a contract. It is merely *evidence of payment*, and may be contradicted and disproved by parol evidence. If a receipt in full be given upon part payment of a claim whose amount is undisputed, with an agreement that the amount so paid shall be a settlement in full, the agreement is not binding, as being without consideration. But if a receipt in full is given upon part

¹ 1 Rice Ev. 268, and cases cited.

² 1 Greenl. Ev. § 303.

³ Id. §§ 297, 300, 301; 1 Rice Ev. 275.

payment of a claim whose amount *is* disputed, by way of compromise, with the agreement that the payment shall be accepted as payment in full, such agreement is binding, and is a bar to an action for a balance claimed as due.¹

3. Oral evidence *cannot be substituted* for any writing, *the existence of which is in dispute*, and which is material to the issue between the parties.²

HEARSAY.

Hearsay denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests in part on the veracity and competency of some other person.³ It is what one person heard some one else say.

The general rule is that hearsay is inadmissible, on two grounds.

1. That, if admitted, it would practically amount to receiving testimony *not given under oath*.⁴

2. That there is no opportunity for *cross-examining* the party actually making the statement.

In five cases EVIDENCE which is APPARENTLY HEARSAY, IS ADMITTED as being really original evidence.⁵

1. *When the question at issue is whether a communication was actually made*, and not whether it was *true*, evidence of the statements of third parties is admissible as original evidence. Thus, a party may state the information on which he acted, in a question involving his good faith.⁶ Also the replies given to an officer at the residence of an absent witness or of a bankrupt may be

¹ See 1 Rice Ev. 231, 232; 1 Greenl. Ev. § 305; 2 Par. Contr. *555, *687 note (8th Ed.).

² 1 Greenl. Ev. § 88.

³ Id. § 99.

⁴ 1 Rice Ev. 370; 2 Best Ev. § 493.

⁵ 1 Greenl. Ev. § 100 *et seq.*

⁶ Taylor v. Willans, 2 B. & Ad. 845; Colman v. Southwick, 9 Johns. 45.

given.¹ On this principle evidence of *general reputation*, etc., may be introduced.²

2. *When bodily or mental feelings are to be proved, the expressions employed at the time in question may be given,*³ such as the expressions of pain uttered by a person injured in an accident.

3. *In cases involving pedigree, the acknowledgment of relationship* by those from whom descent is claimed *is admissible*, as are also inscriptions on tombstones and family portraits.⁴

4. *Circumstances and declarations contemporaneous with the main fact*, closely connected with it, and illustrating its character, may be introduced as a part of the *res gestæ* (things done): such as expressions of pain immediately after an accident.⁵

5. *Certain entries made by third parties.* Thus, entries made in the discharge of official duties are admissible if they are such as it was the duty of the person making them to make, if they are made in the regular course of business and contemporaneously with the original transaction, as in case of entries made by the cashier of a bank, or the charges made by a merchant or his clerk in his shop book, *if made at the time of the transaction.*⁶

In four cases THE RULE AGAINST THE ADMISSION OF HEARSAY EVIDENCE DOES NOT HOLD.⁷

1. In matters of *public* and *general* interest. Thus, evidence is admitted of common reputation in regard to public facts, as the claim of a highway. This exception prevails in only two instances.

¹ Crosby v. Percy, 1 Taunt. 364; Sumner v. Williams, 5 Mass. 444.

² Walker v. Moore, 122 Mass. 501.

³ Insurance Co. v. Mosley, 8 Wall. 397.

⁴ Jackson v. Browner, 18 Johns. 37.

⁵ 1 Rice Ev. 377, and cases cited.

⁶ 1 Greenl. Ev. §§ 116, 117, and cases cited.

⁷ Id. § 127 *et seq.*

(a). In the case of *ancient rights*.

(b). In regard to the declaration of *persons supposed to be dead*.

2. In matters relating to *ancient possession*, ancient documents are admitted.

3. In the case of declarations and entries made by persons deceased, *and against the interest of the person making them*. The fact that the declarations are *against interest* is regarded as a sanction equal to that of an oath.

4. In the case of *dying declarations*. The nearness of death is regarded as equivalent in force to an oath. Such declarations, to be admissible, must be made under a *sense of impending death*.

ADMISSIONS AND CONFESSIONS.

These subjects are usually treated under the head of hearsay. Under certain conditions, they are admissible, being regarded as declarations against interest.

An admission is the *voluntary* acknowledgment of certain facts. A confession is the *voluntary* acknowledgment of guilt.¹

Admissions are admissible in three cases.²

1. *When they are made by a party to the record* in a suit, or by one identified in interest with him.

2. *When made by parties*, not parties to the record, but *interested in the subject-matter of the suit*, as of persons interested in a policy of insurance effected in the name of another, but for their benefit.³

✓ 3. In some cases when made by third parties who are strangers to the suit, as in case of the admission of joint liability by a third party, evidence of which has been held sufficient to support a plea in abatement.⁴

¹ See 1 Greenl. Ev. §§ 169, 170, 213.

² Id. §§ 171, 180, 181.

³ Bell v. Ausley, 16 East. 141.

⁴ Clay v. Langslow, 1 M. & M. 45.

Confessions are of two kinds.¹

1. *Judicial*, or those made before a magistrate or court, in the course of legal proceedings.

2. *Extra judicial*, or all confessions other than judicial.

The chief essential to a valid confession of either kind is that it be *voluntary*. Any threat, or anything in the nature of a threat, invalidates the confession and renders it incompetent. There must be no constraint of any kind.² Herein the rule differs from that governing admissions. Admissions made under any *legal* constraint are good.³

EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

Evidence of this kind comprises five classes.

1. *Professional communications*.⁴ As a rule this applies only to communications made professionally by a client to his attorney. The attorney cannot be compelled, nor is he *allowed* to disclose such communications. In some States, however, the exemption has been made by statute to extend to communications made to physicians and clergymen.⁵

2. Communications made to *judges and arbitrators*.⁶

3. *Secrets of State*, transactions between heads of departments and their subordinates, and proceedings of grand jurors.⁷

4. *Indecent matter*, or that which is injurious to the feelings and interests of third persons.⁸

5. Communications between *husband and wife*.⁹

¹ 1 Greenl. Ev. § 216.

² Id. § 219 *et seq.*; 3 Rice Ev. 489 *et seq.*

³ Id. § 193.

⁴ Id. § 237 *et seq.*; Steph. Dig. of Ev. art. 115.

⁵ For review of statutes see 1 Greenl. Ev. § 248 note (15th Ed.).

⁶ Id. § 249.

⁷ Id. §§ 250 *et seq.*

⁸ Id. § 253.

⁹ Id. § 254, see note (15th Ed.).

WITNESSES.

The attendance of witnesses is enforced by a *subpœna*, a writ commanding the witness to appear before the court at a certain time, to state what he knows in regard to the cause therein described. In case it is desired that the witness bring books or documents with him, a clause to that effect is inserted in the *subpœna*, which is then called a *subpœna duces tecum* (You shall bring with you).

The *fee*, together with a certain amount for *travel*, both of which are fixed by law, must be tendered to the witness before he can be compelled to obey the commands of the *subpœna*. If a witness is in *legal custody*, his presence in court is secured by a writ called *habeas corpus ad testificandum*, directing the person having the custody of the witness to have him in court on a certain day for the purpose of giving testimony.¹

If a witness does not appear in court, when properly summoned, and has no good excuse for his non-appearance, he is guilty of *contempt of court*, for which he may be arrested and punished by fine or imprisonment, or both.²

COMPETENCY OF WITNESSES.

At common law four classes of persons were incompetent to act as witnesses.³

1. *Parties* to the action.
2. Persons *deficient in understanding*.
3. Persons *insensible to the obligation of an oath*.
4. Persons *who have pecuniary interests* directly involved in the matter at issue.

Testimony of parties of classes 1 and 4 is now rendered admissible by statute, while questions con-

¹ 1 Greenl. Ev. §§ 309, 310, 312.

² Id. § 319.

³ Id. § 326 *et seq.*

cerning class 3 vary with the statutes of the different States.

When a person was sworn, and examined as to whether he was a party interested in the cause, he was said to be examined on his *voir dire*.¹

EXAMINATION.

The examination by the party producing the witness is called the *direct* examination. The examination by the opposing counsel is called the *cross-examination*.

There are seven chief rules relating to the examination of witnesses.

1. In direct examination, *leading* questions are not permitted.²

Leading questions are such as *suggest a desired answer* to a witness, as: "You did so and so, didn't you?" Such questions are proper on the cross-examination. There are, however, four cases when leading questions are admissible on the *direct examination*.

(a). When the witness is *evidently hostile*.³

(b). When some *omission* in the testimony is *occasioned by lack of recollection*,⁴ which may be assisted by a suggestion.

(c). When the transaction *involves many items* and dates.

(d). When the *mind* of the witness *cannot be directed to the subject* of inquiry without a *specification* of it.⁵

2. A witness is permitted to *assist his memory* by the use of *written instruments*, memoranda, or entries in books. Writings may be used for this purpose in three cases.⁶

¹ Bouv. Law Dict., sub *voir dire*.

² 1 Greenl. Ev. § 434 *et seq.*; 1 Stark. Ev. *169 *et seq.*; 2 Best Ev. § 641 *et seq.*

³ Williams v. Eldridge, 1 Hill 249.

⁴ Cheeney v. Arnold, 18 Barb. 434.

⁵ Lowe v. Lowe, 40 Ia. 220.

⁶ 1 Greenl. Ev. § 437; see 2 Rice Ev. 744.

(a). When the writing is used *solely to assist the memory* of the witness.¹

(b). When the witness remembers that he has seen the writing before, and remembers that, at the time he saw it, *he knew that the contents were correct.*²

(c). When the witness does not remember having seen the writing in question before, and remembers nothing contained in it, but *from his knowledge that the writing is genuine*, he is enabled to swear to the facts set forth in the writing. Thus a person, being shown a note with his indorsement upon it, can swear that the note passed through his hands.³

3. While, as a rule, witnesses are obliged to testify to facts within their own *knowledge*, yet in some cases expressions of *opinion* or *belief* may be given, as in the case of *experts*, who, on the facts as testified to by other witnesses, may express an opinion in regard to questions of sanity, etc.⁴

4. A party is not allowed to impeach the credibility of *his own* witness. He may, however, introduce *other* witnesses to contradict statements made by a former witness.⁵

5. When the *right* of cross-examination *arises*, it *continues* throughout the cause, so that a party subsequently calling a witness whom he has previously cross-examined, to prove a fact in his own case, may cross-examine him in regard to this fact.⁶

6. Witnesses are *not compelled* to answer questions in four cases.⁷

(a). When it appears that the answer will tend to expose the witness to a *criminal prosecution*, or to any kind of punishment.

¹ Reed v. Boardman, 20 Pick. 441.

² Costello v. Crowell, 133 Mass. 352.

³ See 1 Stark. Ev. *154, Tait. Ev. 432.

⁵ Id. §§ 442, 443; 1 Rice Ev. 609 *et seq.*

⁶ 1 Greenl. Ev. § 447.

⁴ 1 Greenl. Ev. § 440.

⁷ Id. § 451.

(b). When the answer would subject the witness to *pecuniary loss*.¹

(c). When the answer has a direct tendency to *disgrace the character* of the witness. This exception applies only to *collateral* and irrelevant questions asked on cross-examination.

(d). No person can be compelled to testify *against himself in a criminal cause*.

7. The credibility of a witness may be impeached in four ways.²

(a). By *disproving the facts* to which he has testified, by the adverse testimony of other witnesses.

(b). By showing that the witness has, at *other times*, made statements contrary to those given by him at the time of trial.

(c). By a successful *cross-examination*.

(d). By impeaching his general character for *truth* and *veracity*.

¹ This has never been regarded as true even at common law in the United States. See 1 Greenl. Ev. §§ 452, 453.

² 1 Greenl. Ev. § 461 *et seq.*

CHAPTER XXXIV.

CRIMINAL LAW.

A crime is an act committed or omitted, in violation of a public law, forbidding or commanding it.¹ For distinction between Crimes and Torts, see page 149.

In all crimes there must be an *intent to do the act committed*. Unless the act springs from the *will*, it cannot be a crime.² An intent to violate the *law* is not essential to the commission of a crime,—*i. e.*, ignorance of the law is no excuse. Neither is ignorance of the fact that an *act* is unlawful. Thus when the selling of adulterated milk is made a crime, ignorance that the milk sold is below the standard fixed by law is no defence. But there must be the intent to make the *sale*.³

I. **Parties incapable of committing crimes** are, in general, all persons whose wills are either actually, or by presumption of law, incapable of forming the intent to commit a criminal act.⁴ They may be divided into six classes.⁵

1. *Infants under the age of seven* are indisputably presumed incapable of committing a crime. Infants at the age of fourteen *are* presumed capable of committing crime. In case of infants between the ages of seven and fourteen, the question of their criminal capacity is one of fact, the *burden* of proving the existence of criminal capacity *being upon the prosecution*.⁶

¹ 4 Bl. Comm. 5.

² 1 Bish. C. L. § 287; May C. L. § 5.

³ May C. L. § 53.

⁴ See 1 Bish. C. L. § 375; Commonwealth v. Rogers, 7 Met. 500.

⁵ May C. L. § 36 *et seq.*; 4 Bl. Comm. 22 *et seq.*

⁶ 4 Bl. Comm. 23; 1 Bish. C. L. § 368.

2. *Persons of non-sane mind.* The sanity of a person accused of crime must be proved beyond a reasonable doubt.¹

3. Though *voluntary drunkenness is no excuse*, justification, or palliation of a crime, it is yet often to be considered in determining the *degree* of a crime. In crimes where the guilty knowledge and intent form the principal ingredients, as in that of passing counterfeit money, drunkenness may be a defence.²

4. *Persons committing an unlawful act by accident or chance.* See excusable homicide, page 225. An unlawful act arising by accident or chance from a *lawful* act is not a crime, but all unlawful acts arising by accident or chance from *unlawful* acts are regarded as committed with intent, and are crimes.³

5. *Persons committing unlawful acts under a mistake of fact*: as if A, intending to kill a thief, shoots one of his own family.⁴

6. *Persons committing an unlawful act under compulsion, or inevitable necessity*, such as a treasonable act done by a person in the hands of the enemy and under a well-grounded fear of death, or as if one of two persons clinging to a plank in mid-ocean insufficient to support them both, should thrust the other off.⁵

II. Criminals are divided into two general classes.⁶

1. *Principals*, who may be of two degrees: (a) Principals in the *first degree*, or the absolute perpetrators of the crime. (b) Principals in the *second degree*, or those who aid and abet in the crime.

¹ There is much confusion and conflict in this matter, however. See for classification and review of cases, 1 Whart. C. L. § 61.

² *Pigman v. State*, 15 Ohio 555. For general subject and cases, see 1 Whart. C. L. § 51 *et seq.*

³ 4 Bl. Comm. 26.

⁴ *Levet's Case*, 1 Hale P. C. 42.

⁵ See *United States v. Holmes*, 1 Wall. Jr. 1 (Circuit Court); Bacon's Maxims, No. 5.

⁶ See 4 Bl. Comm. 33 *et seq.*; May C. L. § 69 *et seq.*

2. *Accessories*, or persons not the chief actors in the offence, nor present at its commission, but who are in some way concerned therein. Accessories may be of two kinds. (a) Accessories *before* the fact, or persons, who, being absent at the time when the crime was committed, yet procure, counsel, or command another to commit it. (b) Accessories *after* the fact, or persons who, aware that the crime has been committed, receive, comfort, or assist the criminal.

III. Crimes may be divided into three general classes.¹

1. *Treason*.

2. *Felonies*.

3. *Misdemeanors*.

1. Treason is in general disloyalty to one's government. It is defined in the Constitution of the United States,² and of the different States. It is regarded as the gravest of all crimes. At common law treason was of two kinds.³

(a). *Petit* treason.

(b). *High* treason.

(a). Petit treason occurred when an inferior killed his superior, as a servant his master. This is now treated as ordinary homicide.

(b). High treason is that treason which was first defined. Owing to the gravity of the crime, all persons engaged in treason are treated as *principals*. There are no *accessories* in treason.⁴

2. Felonies, at common law, were crimes which involved the *forfeiture* of the criminal's property.⁵ Felony is now largely regulated by statute. The usual test is whether the crime is punishable *with death, or imprison-*

¹ May C. L. § 9 ; 1 Bish. C. L. § 602.

² Art. II. sec. 3.

³ 4 Bl. Comm. 75.

⁴ May C. L. § 72 ; see 1 Bish. C. L. § 605.

⁵ 4 Bl. Comm. 94, 95 ; 1 Bish. C. L. § 615, 2.

*ment in the State prison.*¹ Felonies are the only crimes in which there can be *accessories*.²

3. Misdemeanors include all offences not embraced in treason and felonies. Owing to their comparatively insignificant character, all persons connected with their commission are treated as *principals*.

IV. **The rules of evidence** are, in general, the same in criminal as in civil causes. Two rules, however, require special mention.

1. *Every material allegation made by the prosecution must be proved beyond a reasonable doubt*, or the defendant is entitled to an acquittal.³

2. *No person shall be put on trial twice for the same offence.* This means that when a person has once been put on trial, on a sufficient indictment, and has been convicted or acquitted, this conviction or acquittal is a bar to any subsequent prosecution for the same charge, *in the same jurisdiction*.⁴

V. **Specific crimes.** Among these *twenty-nine* may be mentioned.

1. **Affray**: The fighting of two or more persons in some *public* place.⁵

2. **Arson**: The malicious burning of the *house* of another. The term *house* includes not only the mansion house, but all out-houses which are a parcel thereof, though not contiguous to it, nor under the same roof, as a barn.⁶

3. **Assault and battery.** See page 151.

4. **Barratry**: An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners of a vessel, in violation of their duty as such, and

¹ 1 Bish. C. L. § 618.

² May C. L. § 72; *Commonwealth v. Ray*, 3 Gray 441; *Ward v. People*, 6 Hill 144.

³ May C. L. § 124; see 3 Rice Ev. 431 *et seq.*

⁴ May C. L. § 117 *et seq.*

⁵ 2 Bish. C. L. § 1.

⁶ *Id.* § 8 *et seq.*

directly prejudicial to the owner, and without his consent.¹

5. **Barretry**: The frequent exciting and stirring up of quarrels and suits, either at law, or otherwise.² *Three* instances of offending must be shown in order to convict. *Champerty* and *maintenance* are offences similar to barretry. *Champerty* is a bargain with the plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of the successful termination of the suit, which the champertor undertakes to carry on at his own expense.

Maintenance is the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation.

6. **Bigamy**: The wilful contracting of a second marriage when the contracting party knows that the first marriage is still subsisting.³

7. **Blasphemy**: A false reflection uttered with the malicious design of reviling God. This offence is generally defined and regulated by statute.⁴

8. **Bribery**: The receiving or offering any undue reward by or to any person whose ordinary business relates to the administration of justice, in order to influence his behavior in office.⁵

9. **Burglary**: The *breaking* and *entering* the house of another, in the night-time,⁶ with intent to commit a felony.

Place: It must in general be a house actually occupied as a dwelling, though a house left by the owner, with the intention of returning, is regarded as a dwelling house. At common law, a burglary could be committed in a church.

¹ Bouv. Law Dict., and cases cited; May C. L. § 339.

² Sometimes spelled Barratry; 4 Bl. Comm. 134; Clark C. L. 322.

³ Bouv. Law Dict.; sometimes discussed under *Polygamy*.

⁴ Id. ⁵ Id. ⁶ 2 Bish. C. L. § 90 *et seq.*; Bouv. Law Dict.

Time: The crime must be committed in the *night* time. It is deemed to be night when, by the light of the *sun*, a person cannot clearly discern the face of another.

The breaking may be of two kinds, (a) *actual*, when the burglar breaks or removes any portion of the house, or of its fastenings; (b) *constructive*, as when the burglar gains entrance by *fraud*. The least entry, with the whole or any part of the body, or with any instrument or weapon introduced for the purpose of committing a felony, is sufficient to constitute the offence.

10. **Cheating**: The fraudulent pecuniary injury of another by some token, device, or practice, of such a character as is calculated to deceive the public.¹

11. **Conspiracy**: The combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some lawful purpose by criminal or unlawful means.²

12. **Counterfeiting**: The making of a false piece of money in the likeness of the genuine, with intent to defraud.³

13. **Embezzlement**: The fraudulent appropriation to one's own use, of the money or goods entrusted to one's care by another.⁴ It differs from *larceny* in that the embezzler is originally *lawfully in possession* of the property embezzled.

14. **Embracery**: An attempt, by corrupt means, to induce a juror to give a partial verdict.⁵

15. **Engrossing**: The buying up of such large quantities of an article as to obtain a monopoly, for the purpose of selling it at an unreasonable price. *Forestalling* and *regrating* were similar offences. *Forestal-*

¹ May C. L. § 318; 1 Hawk. P. C. 318, § 1 (8th Ed.).

² Bouv. Law Dict., and cases cited.

³ May C. L. § 336.

⁴ Fagnan v. Knox, 40 N. Y. Super. Ct. 41, 49; May C. L. § 298.

⁵ 2 Bish. C. L. § 384.

ling was buying provisions on the way to market, with the intent to sell them again at a higher price. Regratt-
ing was the buying of provisions in a market, and the
selling of them again in the same market, or within
four miles of the place where they were bought.¹

16. **Extortion:** The unlawful taking by any officer,
under color of his office, of any money or thing of
value, that is not due him, or more than is due, or be-
fore it is due.²

17. **False imprisonment.** See page 151.

18. **Obtaining money under false pretences.**

19. **Forgery:** The fraudulent making or alteration
of a writing to the prejudice of another's right.³

20. **Homicide:** The killing of a human being.⁴
Homicide is of three kinds.

A. Justifiable.

B. Excusable.

C. Felonious.

A. Justifiable homicide, in which there is no guilt,
as when a criminal is executed in accordance with a
sentence of death, or when an officer, in performing
the duties of his office, kills a person who assaults and
resists him.

B. Excusable homicide, in which there is but slight
guilt, and no penalty is inflicted by law. Excusable
homicide is of two kinds.

(*a*). Homicide by *misadventure*, where a person,
doing a lawful act, without any intention of doing an
injury, kills another by accident, as if the head of an
axe, with which a person is at work, should fly off and
kill a bystander.

(*b*). Homicide in *self-defence*. A person may take
the life of another in defence of himself and of certain
other persons, in four cases.

¹ 4 Bl. Comm. 158.

² 2 Bish. C. L. § 390, 2.

³ 4 Bl. Comm. 247.

⁴ Id. 177 *et seq.*; 3 Greenl. Ev. § 114 *et seq.*

[1]. *When one person assaults another and uses violence sufficient to create in the mind of the second a reasonable fear for his life.*¹

[2]. *When two persons have been engaged in a mutual fight and one gives up the struggle: if the latter retreats as far as he can and the other pursues him, the pursued is justified in killing his pursuer in self-defence.*²

[3]. *A man may defend his dwelling to any extremity against persons not lawfully empowered to enter it.*³

[4]. *A person may take the life of another in defence of any member of his family on the principle of constructive self-defence.*⁴

C. Felonious homicide is the killing of any human creature, without justification or excuse. It is divided into two branches.

(a). *Manslaughter.*

(b). *Murder.*

(a). Manslaughter is the unlawful killing of another, *without malice, express or implied.*⁵ Manslaughter is divided into two branches.

[1]. *Voluntary.*

[2]. *Involuntary.*

[1]. Voluntary manslaughter occurs when, *upon a sudden quarrel*, two persons fight, and one of them kills the other.

[a]. Involuntary manslaughter is that resulting in consequence of an *unlawful act*, as when a workman carelessly throws a stone into a street, by which a person is killed. If the street were one but seldom used, the crime would be *manslaughter*; if a frequented thoroughfare, it would be *murder*.

[b]. Murder is the unlawful killing of any human being, *with malice aforethought.*⁶

¹ 4 Bl. Comm. 183; 1 Whart. C. L. § 306.

² Id. 184.

³ 1 Whart. C. L. § 502 *et seq.*; Pond v. People, 8 Mich. 150.

⁴ 4 Bl. Comm. 186.

⁵ Clark C. L. 165 *et seq.*

⁶ Clark C. L. 158 *et seq.*

Malice may be either express or implied ; express, as where previous threats or other circumstances show that the criminal purpose was in the criminal's mind ; implied, as where the criminal purpose, though not directly proved, is indirectly inferred from other facts and circumstances which *are* proved.

21. **Kidnapping**: The forcible abduction or stealing away of a human being.¹

22. **Larceny**: The wrongful and fraudulent taking and carrying away of the *personal property* of another, with the intent to convert it to the taker's use.² This offence can be committed to personal property only,³ so that, at common law, if a person should cut a melon from the vine of another, and carry it away, without *replacing* it on the owner's soil, he would be guilty of *trespass* only, since the melon, when connected with the vine, was *real* property, and could not be made the subject of larceny. But if the melon was replaced on the ground, after being severed from the vine, and was subsequently carried away, the crime of larceny was completed, as the melon was then *personal* property.

Larceny was divided into '(a) *petit*, where the property stolen was twelve pence or less in value ; (b) *Grand*, where the goods stolen exceeded twelve pence in value. Larceny may be also divided into (a) *simple*, including petit and grand larceny ;⁴ (b) *compound*, or larceny accompanied with certain aggravating circumstances, as larceny from the *person*, or from a dwelling-house.

At common law *choses in action* could not be made the subject of larceny.⁵

23. **Libel**. See page 156.

24. **Mayhem**. See page 8.

¹ 4 Bl. Comm. 219.

² 2 East. Pl. Cr. 553.

³ 4 Bl. Comm. 2321 *et seq.*

⁴ Id. 229.

⁵ Id. 239.

⁶ May C. L. § 272 ; *Payne v. People*, 6 Johns. 103 ; *Regina v. Powell*, 5 Cox C. C. 396.

25. **Perjury**: The wilful giving, under oath, in a judicial proceeding or court of justice, of false testimony, material to the issue or point of inquiry.¹ There are six essentials to this crime.²

(a). *The intention must be wilful.*

(b). *The oath must be false.*

(c). *The party must be lawfully sworn.*

(d). *The proceedings must be judicial.*

(e). *The assertions must be absolute.*

(f). *The oath must be on a material point.*

26. **Piracy**: Acts of robbery and depredation on the high seas which, if committed on land, would have amounted to felony.³

27. **Rescue**: The forcibly and knowingly freeing another from arrest or imprisonment.⁴ *Escape* and *Prison Breach* are similar offences.⁵

Escape is the voluntarily and negligently allowing any person, lawfully in confinement, to leave the place of imprisonment.

Prison Breach is the act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody.

28. **Riot**: A tumultuous disturbance of the peace by *three* or more persons, assembling with intent to assist each other against any who shall oppose them in the execution of some private enterprise, and afterwards actually executing the same in a violent and turbulent manner, whether the act intended be of itself lawful or not.⁶ *Rout* and *Unlawful Assembly* are similar offences. Rout differs from riot only in that it may be a complete offence *without the execution of the intended enterprise*.⁷ It is an attempt to commit a riot.

¹ 2 Bish. C. L. § 1015.

³ 1 Russ. Crimes *144.

⁵ 2 Bish. C. L. § 1064 *et seq.*

⁷ Id. § 14; 1 Russ. Cr. *378.

² Bouv. Law Dict., and cases cited.

⁴ 4 Bl. Comm. 131.

⁶ Hawk. Pl. Cr. c. 65, § 1.

Unlawful Assembly is an assembly of persons upon a purpose which, if executed, would make them rioters, but which they do not execute or make any attempt to execute.¹

29. **Robbery**: The felonious and forcible taking from the person of another, of goods or money, by violence or by putting the owner in fear of injury.²

¹ 1 Russ. Cr. *378.

² 4 Bl. Comm. 243.

CHAPTER XXXV.

CORPORATIONS.

A **corporation** is a body, consisting of one or more persons, established by law, usually for some specific purpose, and continued by a *succession* of members.¹

Corporations may be divided into²

1. *Sole.*

2. *Aggregate.*

1. *Sole corporations* are those which, by law, consist of but *one* member at any time, as a bishop, and other ecclesiastical offices. They occur but seldom in the United States.

2. *Aggregate corporations*, or those composed of two or more members at the same time.

Corporations may also be divided into

1. *Ecclesiastical.*

2. *Lay.*

1. *Ecclesiastical corporations* are those created to secure the public worship of God.

2. *Lay corporations* are divided into

(a). *Civil.*

(b). *Eleemosynary.*

(a). *Civil corporations* are divided into

(1). *Public.*

(2). *Private.*

(1). *Public corporations* are those which are exclusively the instruments of public interest, as a city, or county.

(2). *Private corporations* are those created wholly, or in part, for private gain.

¹ Bouv. Law Dict.
(230)

² Id.; 1 Bl. Comm. 469.

(b). *Eleemosynary corporations* are those created for purposes of *charity*.

I. Corporations: how created. In the United States corporations are, as a rule, created by, and derive their authority solely from, the Legislature. Corporations may also exist.—

1. By *prescription*, which presupposes the grant of a charter by the Legislature.¹

2. By *implication*, when such rights are granted, or burdens imposed by the State as imply, for their enjoyment or fulfillment, corporate powers.²

II. Powers. There are five chief powers of corporations.

1. *Perpetual succession*, involving the admission and, for good cause, the removal of members, except in case of stock corporations, where members cannot be removed against their will. The power of removing officers is sometimes called the right of *amotion*.

2. *The power to sue and be sued*, to grant and receive grants of land, etc.

3. *The power to transmit all its property in succession*.

4. *The power to have a seal*, and to alter it at pleasure.

5. *The power to make by-laws* for the government of the corporation, so far as they are consistent with the charter and the law of the land.

III. How dissolved. A corporation may be dissolved in four ways.⁴

1. *By act of the Legislature*. A *public* corporation can always be so dissolved.⁵ A *private* corporation

¹ *King v. Mayor, etc.*, 14 East. 360; *Robie v. Sedgwick*, 35 Barb. 326; 1 Morawetz Pri. Corp. § 36.

² *Denton v. Jackson*, 2 Johns. Ch. 325 (Kent. Ch.); *Stebbins v. Jennings*, 10 Pick. 188.

³ 1 Bl. Comm. 475.

⁴ 1 Bl. Comm. 485.

⁵ 1 Dill. Mun. Corp. § 54.

cannot be dissolved in this way, without its consent, unless there is a provision to that effect in its charter.¹

2. *By the death of all its members*, no successors having been appointed or chosen.

3. *By the surrender of its charter.*

4. *By the forfeiture of its charter.*

The forfeiture of the charter, by breach of conditions, must be declared and enforced by the State, by direct proceedings to secure that effect; and prior to such action, no advantage of the breach of condition can be taken by a private individual, in any *collateral* proceeding.²

At common law it was the doctrine that corporations could act only through or under the seal, but this is now obsolete, and the tendency of the law is to treat corporations as natural persons, so far as their contracts and torts are concerned.³

¹ 2 Morawetz Pri. Corp. § 1013.

² Dyer v. Walker, 40 Pa. St. 157; Heard v. Talbot, 7 Gray 120; Young v. Harrison, 6 Ga. 130.

³ 2 Kent Comm. 288 *et seq.*; A. & A. Corp. §§ 281-286; 1 Morawetz Pri. Corp. § 338.

RULES REGULATING
ADMISSION TO THE BAR IN
ALL THE STATES AND TERRITORIES OF
THE UNITED STATES.



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Alabama.

Any *man*, of the age of twenty-one, of good moral character, and possessing the requisite qualifications of learning and ability, is entitled to admission to the bar of Alabama.

Application for admission must be addressed to the Supreme Court, Court of Chancery, or the Circuit Court. Persons admitted to practice in the Supreme Court can practice in all other courts. Persons admitted in any of the other courts can practice in all courts, except the Supreme Court.

Applicants must be examined in open court, upon these subjects :

1. Law of Real Property.
2. Law of Personal Property.
3. Law of Pleading and Evidence.
4. The Criminal Law.
5. Commercial Law.
6. Chancery and Chancery Pleading.
7. The Statutes of the State.

The Supreme Court may appoint an examining committee to conduct examinations either in public or private.

Attorneys from other States, locating in Alabama, are admitted to practice on such terms as Alabama attorneys are admitted to practice in them.

Arizona.

Application for admission may be made at the term of any District Court or of the Supreme Court, accompanied by a certificate from the Board of Supervisors of the county in which the applicant resides, that he has been a resident of the Territory at least six months and is of good moral character. Thereupon the court appoints an examining committee of three attorneys, who, on a day fixed by the court, examine the candidate in open court. Upon satisfactory examination, the applicant is admitted to practice in any inferior court, if he applies to the District Court for examination. If he applies to the Supreme Court, he is admitted to practice in any court in Arizona.

Attorneys from other States and Territories, locating in Arizona, are admitted to practice upon producing the license of the court in which they were admitted to practice, and satisfactory evidence of good moral character. No prior residence in Arizona is necessary to entitle the attorney to admission.

Arkansas.

Any male citizen of the United States, of the age of twenty-one, of good moral character, may be admitted to practice upon passing a satisfactory examination before a Circuit Court. Satisfactory proof of the foregoing facts must be produced before the examination. Attorneys from other States, locating in Arkansas, must be examined prior to their admission to practice. Licenses to practice before the Circuit Courts do not entitle their holders to enrollment in the Supreme Court without examination.

California.

Any citizen, or any person who has *bona fide* declared his or her intention to become a citizen, of the age of twenty-one, of good moral character, and possessing the requisite learning and ability, is entitled to admission as an attorney and counsellor.

Every applicant must produce a satisfactory certificate of good moral character, and undergo a strict examination in open court by the Justices of the Supreme Court, or by the Justices sitting and holding one of the departments thereof, *provided* that the several Superior Courts may admit applicants to practice in their respective courts, upon examination and the production of satisfactory testimonials as aforesaid.

Any citizen of the United States, or person resident in this State, who has *bona fide* declared his intention of becoming a citizen, according to the manner required by law, who has been admitted to practice in the highest court of a sister State, or of a foreign country, where the Common Law forms the basis of its jurisprudence, may be admitted to practice in the courts of California, upon the production of his or her license, and satisfactory evidence of good moral character, but the court may examine the applicant as to his qualifications.

Colorado.

No person shall be entitled to receive a license to practice law until he shall obtain a certificate from the court of some county of his good moral character, also from one or more reputable counsellors-at-law, that he has been engaged in the study of law for two successive years prior to his application for a license.

A standing committee of three attorneys is appointed by the Supreme Court for each judicial district, whose duty it is to examine applicants.

Any person producing a license from a court of record, or a duly authenticated copy of the record of any court of record in the United States, showing that he has been admitted to practice in that court, shall be admitted to practice in Colorado.

Women are not admitted to the Colorado Bar.

Connecticut.

The Judges of the Superior Court shall appoint an examining committee of fifteen, of which one or more shall be judges of said court, and the rest attorneys residing in this State. One third of this committee goes out of office on July 1, of each year.

This committee shall hold two sessions annually for the examination of applicants, one in Hartford, beginning at 10 A.M. on the Friday after Christmas, or, if the said day be New-Year's, on Thursday, and one at the court-house in New Haven, on the second Thursday before the last Monday of June. The members present shall be a quorum.

To entitle an applicant to examination, he must satisfy the committee—

1st. That he has filed with the clerk of the Superior Court where the examination is held, a certificate from the clerk of the Superior Court of the county in which he intends to apply for admission, which must be the county in which he has last studied; or if he has not studied in this State, the county in which he resides—that said applicant filed notice of his intention to apply for examination with said clerk, at least fifteen days prior to the date of such examination, and that subsequently, at a meeting of the bar, it had been voted that such intended application was approved.

2d. That he has paid to the clerk of the Superior Court for the county in which the examination is held, the sum of ten dollars.

3d. That he is a citizen of the United States, and twenty-one years of age.

4th. That he is a person of good moral character.

5th. That before beginning the study of law he graduated from a college, high school, or preparatory school, or was admitted to some college, or professional school, or passed an examination upon his literary qualifications before said examining committee.

6th. That after reaching the age of eighteen he has studied law for two years, if a college or law school graduate, otherwise for three years, in a law school, or under competent professional instruction in the office of a practicing attorney, or both, of which period one year, at least, must be spent in this State.

Applicants must pass a satisfactory examination on the following subjects: Pleading, Practice and Evidence, Constitutional Law, Real and Personal Property, Contracts, Torts, Equity, Criminal Law, Wills and Administration, Corporations, Partnership, Negotiable Paper, Agency, Bailments, Domestic Relations, and any additional subjects in the discretion of the committee.

The committee shall certify to the clerk of the Superior Court in the county in which the applicant filed notice of his intention the name of any applicant who has passed the examination, and said applicant is thereupon admitted to practice upon motion, upon the payment of a fee of five dollars.

Attorneys in the highest court of original jurisdiction in another State are admitted to examination before said committee, upon satisfactory proof that they are such attorneys, twenty-one years of age, of good moral character, and have filed with the clerk of the Superior Court in the county in which they reside, notice of their intention to apply for examination, and that the Bar of said county has approved such application.

If such persons have practiced three years in the

highest courts of another State, they may be admitted by the court without examination, upon vote of the Bar, and proof of citizenship and good moral character.

Delaware.

There shall be appointed at the spring term in each county, to serve for one year or until their successors are appointed, a Board of Examiners, of not less three nor more than five members of the Bar. No person shall be registered as a student of law except upon the certificate of said Board that he is a resident of the State, of good character, and that he has been found, upon examination, to be well qualified to commence the study of the law. The examination embraces the following subjects:

Latin—the student being allowed to designate that one of the following authors which he chooses: Cæsar, Cicero, Livy, and Horace; History generally, and American and English history particularly; Mathematics, as far as plane Trigonometry. Sometimes the candidate's knowledge of the rudimentary branches is tested, but he is supposed to know them.

Such certificate shall be endorsed with the approval of a judge and filed with the Prothonotary, and recorded in the appearance docket. Upon application for admission of a student to practice, it is required that he be a resident of the State, of full age; that he shall have studied law at least three years after the filing of said certificate, under the direction of a member of the Bar of this State who has been in practice for at least ten years theretofore, or of a Judge of any of the courts of the State, or of a Judge of a court of the United States residing in this State; that he be a person of integrity and good character, and that he shall have been privately and fully examined by said Board of Examiners, and he shall be admitted only on the

written report of said Board, stating his qualifications and recommending his admission.

Examinations may be oral or in writing, or both, at the discretion of the Board. The action of a majority of the Board shall in all cases be sufficient.

Attorneys admitted elsewhere, if they be residents of this State, of good character, and have practiced for three years in the Superior Court of any other State, upon the written report of the Board of Examiners stating their qualifications and recommending their admission, may, in the discretion of the court, be admitted to practice in this State. Said Board is authorized to subject any applicant under this rule to such examination as they may deem expedient.

Attorneys may be admitted *pro hac vice* in the discretion of the court, but no attorney, while engaged in the practice of law in another State, shall be admitted to practice in this State except *pro hac vice*. •

A separate examination is necessary for admission to practice in the Court of Chancery.

Florida.

Candidates, upon presenting to one of the Judges of the Circuit Court satisfactory evidence that they are twenty-one years of age, and of good moral character, shall be examined by the court or a committee appointed for that purpose, and, if found qualified, shall be admitted. Attorneys who have been admitted to practice in any court of record in any State of the Union shall be admitted to practice in any court, upon producing evidence of having been so admitted.

Georgia.

Attorneys admitted to practice in the Superior Courts may practice in all courts except the Supreme Court; for which a special license must be obtained.

For the purpose of admission to the Bar, the candidate must apply, by petition, to a Superior Court during one of its sessions in the circuit of which he is a resident or in which he has read law, and must show—(1) his citizenship in the United States, (2) good moral character, (3) that he has read Law, (4) that he has been a resident, or that he has read law in the circuit aforesaid. Of these facts there must be a certificate of two attorneys of the court, or other evidence satisfactory to the court. The applicant must be examined in open court upon—

1. The principles of the Common and Statute Law of England in force in Georgia.

2. The Law of Pleading and Evidence.

3. The principles of Equity and of Equity Pleading and Practice.

4. The Revised Code of Georgia, the Constitution of the United States, the Rules of Practice in the Superior Courts.

Graduates of the Lumpkin Law School, and of the Law Department of Mercer University, are admitted to practice upon presentation of diplomas.

Attorneys from other States are admitted to practice in Georgia upon producing proof of such admission, and undergoing an examination touching the laws of Georgia, by the Superior Court, *provided* that such other States permit Georgia attorneys to practice in their courts.

Attorneys from other States who become actual residents of Georgia are admitted to practice upon undergoing an examination as to the laws of Georgia, given by the Superior Court, after producing to the court satisfactory evidence that they were attorneys-at-law in good standing in a court of similar jurisdiction in the State from which they came. Attorneys who have been admitted to practice in the Superior Court of

Georgia are admitted to practice in the Supreme Court upon producing satisfactory proof of good private and professional character. The recommendation of one or more respectable members of the Bar is sufficient, and is always required.

Aliens are eligible for admission to the Bar after a residence of two years in the State.

Idaho.

Any white, male citizen, or one who has bona fide declared his intention of becoming a citizen, in the manner required by law, of the age of twenty-one, of good moral character, upon producing satisfactory testimonials of good character and undergoing a strict examination by the Justices of the Supreme Court, may be admitted to practice. District Courts may admit persons to practice in their respective districts in like manner.

Attorneys who have been admitted to practice in the highest court of any other State or Territory are admitted to practice in Idaho, upon affidavit of such admission or the production of a license showing the same.

Illinois.

Applicants must have studied law for two years in the office of an attorney or at a law school. There must be a certificate from some court of record in the county in which the applicant has studied as to his good character. Diplomas from law schools organized under the laws of the State, in which the regular course consists of two years, with thirty-six weeks to the year, may be accepted in place of the examination, but a motion for the admission of the party having the diploma must be made by some attorney of the court, supported by proof of good moral character.

Examinations are given by the Appellate and Su-

preme Courts, and are both oral and written. Attorneys from other States who wish to locate in Illinois may be admitted without examination, if it appears that the State in which the license was issued requires a two years' course of study, or if the applicant has practiced two years in the State from which he comes. Otherwise he must be examined.

Women may be admitted to practice.

Indiana.

Every person of good moral character, being a voter, shall be entitled to admission to practice law in all the courts of justice. Six months' residence in the State, 60 days in the township, and 30 days in the ward or precinct are the qualifications for a voter, assuming him to be of age. The applicant appears in open court and some member of the Bar moves his admission, whereupon he is sworn to perform the duties of an attorney, etc. This is all that is absolutely required to enable a person to practice law. A roll of attorneys is, however, required to be kept by every court, and "no names shall be placed thereon except of such persons as are shown to be qualified to practice law by reason of their learning therein," as shown by an examination conducted by the Judge or a committee of the Bar whom the Judge may select for that purpose. Attorneys from other States are admitted on a certificate of membership of the Bar of the State from which they come. Graduates of law schools are admitted on presentation of their diplomas.

Iowa.

The applicant must be twenty-one years old, of good moral character, an inhabitant of the State, and must actually and in good faith have studied law two years either with some member of the Bar of Iowa or in

some reputable law school, or in both. Thirty-six weeks in a law school is equivalent to one year's study. Every applicant is examined by the Supreme Court or by a committee appointed by it for the purpose. The examination consists of not less than thirty questions in writing, and there may also be an oral examination.

Attorneys from other States may be admitted without examination and without proof of having studied law two years, on satisfactory proof that they have practiced law not less than *one* year in the State from which they came.

Kansas.

Any person, being a citizen of the United States, who has read law two years, the last of which must be in the office of a regularly practicing attorney, who shall certify that the applicant is of good moral character and well qualified to practice law, and who is actually an inhabitant of Kansas, and who satisfies any district court that he possesses the requisite learning and is of good moral character, may be admitted by said court to practice in all the district and inferior courts of the State. The Supreme Court may, on motion, admit any practicing attorney in the district court, to practice in the Supreme Court.

Attorneys from other States or Territories, having business in any court of Kansas, may be admitted to practice in such court on motion, upon taking the required oath. Attorneys from other States locating in Kansas, must apply for admission to a District Court, whose Judge may admit on motion, or with an examination, according to his discretion.

Kentucky.

The applicant must obtain a certificate from the county court of the county in which he is a resident, that he is a person of honesty, probity, and good de-

meanor. This certificate must be filed with the clerk of a Circuit Court, on or before the fourth day of the regular term of the court, which filing shall be regarded as an application for a license. On the fourth day of the term, the court shall appoint two examiners whose certificate to the effect that the candidate has passed a satisfactory examination, after being approved by the Judge of the court, shall be a license to practice law in any courts of the State. The certificate of the County Judge may be presented to a Judge of the Court of Appeals, who, with another Judge of that court, shall examine the applicant.

. Attorneys-at-law of any State in the United States, who have been regularly admitted to practice in the Supreme Courts of their own States, may be admitted to practice law in any of the courts of Kentucky upon motion.

Louisiana.

Any citizen of the United States possessing the qualifications—except that of residence—necessary to constitute a legal voter, shall be admitted to practice upon obtaining a license from the Supreme Court. The Supreme Court shall grant licenses to the following: (1). To graduates of the Law Department of the University of Louisiana, upon producing evidence of good character. (2). When the applicant produces a license to practice law in any other State of the Union, or a diploma from any law school in any other State, upon being examined in open court touching the candidate's fitness to practice in the courts of Louisiana. (3). Other applicants are examined by the Supreme Court on the general law and the civil law as applied in the courts of Louisiana.

Maine.

The candidate must have studied law two years in the office of some attorney, or a part of the time may be spent in such office and the remainder in some law school. Notice of the candidate's application for admission to the Bar must be published in some newspaper by the clerk of the court to which application is made thirty days before the examination. Every candidate must present to the examining committee a written recommendation from the member of the Bar with whom he has studied.

The examinations are public and are held in the presence of some Justice of the Supreme Court during term time. They are conducted by an examining committee of the Bar in each county, and this committee is appointed by the Chief-Justice of the Supreme Court. The examinations are both oral and written.

Attorneys from other States who have been in good standing and in active practice for three years are admitted upon motion, and without examination.

Maryland.

Applications for admission may be addressed to one of the Circuit Courts, to the Court of Appeals, and by candidates from the city of Baltimore to the Supreme Bench for Baltimore. The candidate must be a male white citizen of the United States, and must have studied law in any portion of the United States for two years preceding his application. He is examined by a Board consisting of not less than three members of the Bar. Evidence of good moral character must be produced. Rejected applicants cannot apply again in less than twelve months.

Attorneys from other States or Territories are admitted to practice in the same manner in which attorneys from Maryland are admitted to practice in those

States or Territories, provided that the terms for admission to the Bar are regulated by law. Where there are no such regulations, the court to which application is made may admit or not, according to its discretion. An applicant rejected by the other courts of Maryland may appeal to the Court of Appeals, whose decision in the matter shall be final.

Massachusetts.

The application must be made by way of petition to the Supreme or the Superior Court, which petition may be filed at any time prior to the examination. The examination is conducted by an examining committee, usually consisting of three members of the Bar, and its nature varies in the different counties, in some of which it is wholly oral, while in others it is both written and oral. The candidate must be twenty-one years old, of good moral character, and must declare his intention to practice law in the State. His petition must be approved by some attorney of the court. No time is required, by statute, to be spent in preliminary study, but it is the unwritten law that at least two years shall be so spent. An applicant cannot, however, be refused examination nor rejected on this ground. Rejected applicants are not permitted to apply again in less than six months.

Attorneys from other States who have been admitted to practice in the highest judicial courts of those States are admitted to practice in Massachusetts upon satisfactory evidence of good moral character and professional qualifications. The matter is usually referred to the examining committee of the county in which the application is made.

Women are admitted on the same terms as men.

Michigan.

The applicant must address a petition to the Circuit Court of whose district he is a resident, stating that he is a citizen of the United States, twenty-one years old, and that he is a resident of the judicial circuit in which the application is made. The applicant must also state the length of time in which he has been engaged in the study of law,—though no definite time is needed to entitle him to examination,—and that he believes himself qualified to act as a counsellor-at-law. The petition must be verified by oath and be accompanied by a certificate of at least one member of the Bar, or some other reputable person known to the court, certifying to the good moral character of the applicant.

Attorneys from other States are usually admitted upon motion if they have been engaged in practice for a considerable period ; otherwise, after examination.

Mississippi.

The applicant must be twenty-one years old, a citizen of the United States, and a resident of the State. Application may be made to the Supreme Court, or to any Circuit or Chancery Court. The examination is held in open court, and, if found qualified, the candidate is admitted to practice. A diploma from the Law Department of the State University is equivalent to a license to practice.

Attorneys from coterminous States are admitted to practice upon the same terms that Mississippi attorneys are admitted to practice in those States, and are not required to take the oath to support the Constitution of Mississippi. Attorneys from other States, locating in Mississippi, are examined in all cases prior to admission.

Missouri.

The candidate must file with the clerk of the Supreme Court, the St. Louis Court of Appeals, or of some Circuit Court, fifteen days at least before the first day of the next term, a written application for examination, in which he states his age and his good moral character. No prior residence is required, and there is no statutory regulation in regard to the time to be spent in study, though it is expected that two or three years will be so spent. There must be satisfactory evidence of good character, and the application must be approved by some attorney of good standing. The examination is conducted by the Judges in open court.

Attorneys from other States locating in Missouri are admitted to practice upon passing a satisfactory examination.

Montana.

Application for admission must be made to the Supreme Court, stating age, etc., accompanied by a certificate from the court of some county of the applicant's good moral character, and there must also be a certificate from one or more reputable counsellors-at-law that he has been engaged in the study of law for two successive years prior to his application. An examination is given by an examining committee of three attorneys, appointed by the Supreme Court for each judicial district,

Attorneys from other States or Territories, locating in Montana, are admitted to practice without examination, upon presenting to the Supreme Court a petition which shall state where the candidate read law and was admitted, where he has practiced his profession, and when, where, and how long he was last engaged in the practice of law. The petition must be accompanied by a certificate of the presiding Judge of

the highest court in which he last practiced that he was of good standing in his profession in that jurisdiction. The petition must also state whether or not any proceedings for disbarment have ever been had against the applicant in any court of any State, and must be verified by affidavit.

Nebraska.

Application is usually made for admission to the Circuit Court of the judicial circuit in which the applicant resides. A person admitted to practice in the Circuit Courts is admitted to practice in the Supreme Court on motion.

The candidate must be twenty-one years old, of good moral character, and must have studied law two years and must pass a satisfactory examination on the principles of the Common Law.

Any person producing a license or satisfactory voucher proving that he has been regularly admitted as an attorney-at-law in any court of record in the United States, and that he is of good moral character, may be admitted to practice in any court of the State, without examination.

New Hampshire.

Students are eligible for examination for admission to the Bar who have studied for three years in the office of an attorney, or who have studied for two years in an office of some counsellor of the highest court of another State and one year in the office of a New Hampshire attorney.

Examinations are held by the Supreme Court, or by a committee of the Bar appointed for the purpose.

Attorneys who have been admitted to practice in the highest judicial court of another State may be admitted to practice in the courts of New Hampshire upon

satisfactory evidence of good moral character, without examination, where the circumstances of the case render it unnecessary. By a Rule of Court, attorneys who have practiced one year in other States may be admitted upon furnishing satisfactory evidence thereof.

New Jersey.

The candidate must be twenty-one years old, and cannot be admitted to examination unless he shall have served a regular clerkship with some practicing attorney of the Supreme Court for the term of three years at least, if he shall have been previous to the commencement of such service, admitted to the degree of Bachelor of Arts or of Science in any college or university in the United States, and for the term of four years, if he shall not have been so admitted. He must produce to the court a certificate from the person with whom his clerkship has been served, or other satisfactory evidence that he has not, at any time during such clerkship, been engaged in, or pursued any occupation or employment, incompatible with the full, fair, and *bona fide* service of his clerkship. Any portion of time, not exceeding eighteen months, spent in regular attendance upon the law lectures in any college or university, or in any law school of established reputation in the United States, shall be allowed in lieu of an equal period of clerkship.

No attorney from another State shall be licensed to practice unless he shall first submit himself to an examination; nor shall he be admitted to the examination, unless the time which he shall have served as a clerk, and the time he shall have practiced as an attorney shall, in the whole, amount to *four* years at least, and shall produce satisfactory proof of his moral and professional standing in the State from whence he comes; provided that no such person shall be admitted at all,

unless an attorney from this State would be admitted in such State on the same or equally favorable terms. The examinations are conducted by a Board of Examiners, consisting of six counsellors of the Supreme Court. They are both oral and written.

A distinction is made between counsellors and attorneys. The latter must be examined, and must have practiced for three years before they are entitled to an examination to become counsellors. The examination in this case is upon the principles and doctrines of the law, and upon the candidate's ability as a pleader.

New York.

RULE I.

NO person shall be admitted to practice as an attorney or counsellor in any Court of Record in this State, without a regular admission to the bar and license to practice granted by an Appellate Division of the Supreme Court.

RULE II.

Any person who has been admitted to practice, and has practiced three years as an attorney and counsellor in the highest court of law in another State, and any person who has thus practiced in another country, or who, being an American citizen and domiciled in a foreign country, has received such diploma or degree therein, as would have entitled him, if a citizen of such foreign country, to practice law in its courts may, in the discretion of an Appellate Division of the Supreme Court, be admitted and licensed without an examination. But he must possess the other qualifications required by these rules, and must produce a letter of recommendation from one of the Judges of the highest Court of law of such other State, or country, or furnish other satisfactory evidence of character and qualifications.

RULE III.

All other persons may be admitted and licensed upon producing and filing with the Court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions ; and upon producing and filing with the Court evidence that such applicant is a person of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the Court may make further examination and inquiry.

RULE IV.

To entitle an applicant to an examination as an attorney and counsellor, he must prove, by his own affidavit, to the satisfaction of the State Board of Law Examiners :

First. That he is a citizen of the United States, twenty-one years of age, stating his age, and a resident of the State, and that he has not been examined for admission to practice and been refused admission and license within three months immediately preceding.

Second. That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his annexed preliminary papers, except that if the applicant be a graduate of any college or university, his period of study may be two years instead of three ; and except also that persons who have been admitted as attorneys in the highest Court of original jurisdiction of another State or country, and have remained therein as practicing attorneys for at least one year, may be admitted to such examina-

tion after a period of law-study of one year within this State.

RULE V.

Applicants for examination shall be deemed to have studied law within the meaning of these rules only when they have complied with the following terms and conditions—viz. :

1. The provisions for requisite periods of study must be fulfilled by serving a regular clerkship in the office of a practicing attorney of the Supreme Court in this State after the age of eighteen years ; or after such age, by attending an incorporated law school, or a law school connected with an incorporated college or university having a law department organized with competent instructors and professors, in which instruction is regularly given ; or after such age, by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship.

2. If the applicant be a graduate of a college or university, he must have pursued the prescribed course of study after his graduation ; and if he be a person admitted to the bar of another State or country, he must have pursued his prescribed period of study after having remained an attorney in such other State or country for the period of one year.

3. Applicants who are not graduates of a college or university, or members of the bar as above prescribed, shall, before entering upon a clerkship or attendance at a law school herein prescribed, or within one year thereafter, have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or

in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact signed by the Secretary of the University with the Clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed either, first, a certificate properly authenticated, of having successfully completed a full year's course of study in any college or university; second, a certificate properly authenticated, of having satisfactorily completed a three years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma. The Regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

Attendance on a law school during a school year of not less than eight months in any year, shall be deemed a year's attendance under this rule; and in computing the period of clerkship a vacation actually taken, not exceeding two months in each year shall be allowed as part of such year.

It shall be the duty of attorneys, with whom a clerkship shall be commenced, to file a certificate of the same in the office of the Clerk of the Court of Appeals, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year. The same period of time shall not be duplicated for different purposes, except that a student attending a law school as herein provided, and who, during the vacations of such school, not exceeding three months

in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

RULE VI.

The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled ; which proof shall be made as follows—viz. :

1. That the applicant is a college graduate, by the production of his diploma or certificate of graduation under the seal of the college.

2. That he has been admitted to the bar of another State or country, by the production of his license or certificate executed by the proper authorities.

3. That he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, by producing and filing with the Board a certified copy of the attorney's certificate as filed in the office of the Clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys, with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year.

4. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school, which proof must be satisfactory to the Board of Examiners.

5. That the applicant has passed the Regents' examination or its equivalent, must be proved by the production of a certified copy of the Regents' certificate filed in the office of the Clerk of the Court of Appeals, as hereinbefore provided.

6. When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost or destroyed without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

7. A law student whose clerkship or attendance at a law school has already begun, as shown by the record of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may at his option file or produce instead of the proofs required by these rules those required by the rules of the Court of Appeals adopted October 28, 1892.

RULE VII.

When the filing of a certificate as required by these rules has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date. All certificates heretofore issued to law students by the Board of Regents and founded upon equivalents instead of an actual examination, are validated and made effectual, and may be accepted as sufficient by the Board of Law Examiners.

RULE VIII.

The State Board of Law Examiners shall be paid as compensation, each the sum of two thousand dollars per year, and, in addition, such further sum as the Court may direct, and an annual sum not exceeding

two thousand dollars per year shall be allowed for necessary disbursements of the Board. Every applicant for examination shall pay to the examiners a fee of fifteen dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining they shall pay into the treasury of the State ; provided, however, that such compensation and allowance for any one year shall not exceed the aggregate of fees received for such year. The examinations held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require as is reasonably possible. An applicant who has failed to pass one examination cannot again be examined, until at least three months after such failure.

RULE IX.

The State Board of Law Examiners shall hold at least one examination in each judicial department, at the city or village in which the Appellate Divisions of the Supreme Court are held, between the tenth day of June and the twentieth day of July in each year, and one examination in each department at the places above named, during the month of January in each year. They may appoint other times and places for additional examinations, and may hold some or all of such additional examinations concurrently with the regular or annual examinations of any law school in this State, and any applicant entitled to be examined may be so examined in any department, whether a resident therein or not.

These rules shall take effect on January 1, 1896.

Nevada.

Any white, male citizen of the United States, of the age of twenty-one, who possesses the requisite qualifications of learning and ability, and is of good moral character, may be admitted to practice law in all the courts of Nevada. An examination is held by a committee for each judicial district, consisting of at least three, of whom the District Judge is one. The testimonials of good character and the examination may

be dispensed with in the discretion of the Supreme Court.

Attorneys from other States are admitted to practice in Nevada upon making affidavit of their admission to practice in such other States, or upon the production of their license. A fee of \$25 must be paid prior to the application for admission, by all candidates. In the examination the questions and answers must be in writing. The following subjects may be embraced in the examination :

1. The history of Nevada and of the United States.
2. The constitutional relations of the State and Federal Governments.
3. The jurisdiction of the various courts of the State and of the United States.
4. The various sources of our municipal law.
5. The general principles of the common law relating to property and personal rights and obligations.
6. The general grounds of equity jurisdiction, and the principles of equity jurisprudence.
7. Rules and principles of pleading and evidence.
8. Practice under the civil and criminal codes of Nevada.
9. Pleadings in hypothetical cases.
10. The course and duration of the candidate's studies.

North Carolina.

Applicants who apply for admission to practice in all the courts are examined by two or more Justices of the Supreme Court. Sufficient age, good moral character, and learning are the qualifications. No specified term of preliminary study is required.

Attorneys from other States and foreign countries shall not be admitted to practice in the courts of North Carolina, unless they shall have previously resided in the State one year, or unless they shall produce to the

Justices of the Supreme Court a testimonial from the chief magistrate of such State or country, or from some other competent authority, that they are of unexceptionable moral character.

(For North Dakota see South Dakota.)

Ohio.

The applicant must be twenty-one years old, must have resided in the State for the year next preceding his application for admission, and must be a citizen of the United States, or have declared his intention of becoming a citizen thereof. He must produce from some attorney a certificate to the effect that the applicant is of good moral character and that he has regularly and attentively studied law during a period of two years previous to his application for examination, and that he believes him to be a person of sufficient legal knowledge and ability to practice law.

Attorneys from other States who locate in Ohio may be admitted to examination upon proving that they have studied law for two years with some attorney—the signature to whose certificate, if unknown to the court, must be authenticated by the certificate of the clerk under the seal of the court of the State from which the applicant comes—or that they have been engaged in the practice of law for two years, which practice must be certified to by a Judge of the court, or an attorney in good standing at the Bar, authenticated in like manner.

Women are admitted on the same terms as men.

Oregon.

Applicants are examined by the Justices of the Supreme Court, or under their direction, upon the common law, the law merchant, the principles of equity jurisprudence, the history and constitutional law of

England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of Oregon, and the practical administration of the law. Every applicant must produce the certificate of some attorney of good standing, that such applicant has read law at least two years, if a graduate of some literary institution, or if not such a graduate, at least three years, and that he has the requisite learning and ability. There must also be a certificate of two attorneys that the applicant is a man of good character. The certificate of the length of time spent in study is dispensed with if the applicant produces a diploma from any regular law school, showing that he has graduated at such school. The applicant must also file his affidavit that he is a citizen of the United States, and has read the books, a list of which shall be included in his affidavit.

Attorneys who have been admitted to the Bar of the Supreme Court or court of last resort of any other State or Territory, or of England, her colonies and dependencies where the common law prevails, and who are otherwise qualified, may be admitted to practice in the courts of Oregon on motion founded upon proper certificates of admission to such courts, accompanied by a certificate signed by a Judge of some court of general jurisdiction in the county in which the applicant last resided that he is of good moral character and standing at the Bar, and has practiced law at least one year.

Women are admitted upon the same terms as men.

Pennsylvania.

The rules in this State vary somewhat in the different counties. The following are those operating in Alleghany County, which may be taken as a type of those prevailing throughout the State.

It shall be the duty of every attorney to register with the Prothonotary the name, age, and place of residence of every person studying law under his direction, and the term of study shall be computed from such registration. But no person shall be registered as a student of law until he shall have been examined by the Board of Examiners on the elements of the Latin language and all the branches of a thorough English education, including algebra, geometry, and natural sciences, or fair equivalents therefor.

No person shall be admitted to practice as an attorney except upon the following conditions:

1st. He shall be a citizen of the United States and of full age.

2d. Every student applying for admission shall first cause notice to be published in the *Pittsburg Legal Journal*, of his intention to make such application, for one week prior to his examination by the Board of Examiners, which notice shall set forth the name of the applicant, in whose office he has studied, and at what time he will apply to be admitted.

3d. He shall have served a regular clerkship in the office, and shall have studied under the direction of an attorney or judge, for three years, or pursued the study of law in some law school of good repute, or, after being of full age, he shall have pursued his studies diligently in the office of some practicing attorney or of a judge, for the term of two years; provided that a course of study in any law school of good repute shall be deemed equivalent to a like term of study in the office of an attorney.

4th. He shall undergo an examination by a Board of Examiners, appointed by the court, on the principles and practice of law and equity, and shall file with the Prothonotary, at the time his admission is moved for, a certificate signed by all the examiners who were

present at his examination, that he is sufficiently qualified for admission to the Bar, and that they have received satisfactory evidence of his good moral character.

The examination shall consist partly of written questions, to be answered in writing by the student, which questions and answers shall be reported to the court.

Unless otherwise specially ordered, no person admitted to practice in other States shall be admitted to practice in Pennsylvania, until he shall have appeared before the Board of Examiners, and produced a certificate, signed by all the examiners present at his examination, that they have received satisfactory evidence of his moral character and professional qualifications, including at least two years of diligent study or practice of the law, and recommending his admission to the Bar. Written notice of his intention to apply for such admission shall be given to the Board at least two weeks prior to such application. This rule does not apply to attorneys from other courts, seeking to be admitted for special cases.

All motions for admission to the Bar shall be made by members of the Board of Examiners.

Rhode Island.

Persons who have had a classical education and have studied law two years, six months of which must have been spent in the office of a counsellor of Rhode Island, may be admitted, after passing a satisfactory examination before an examining committee appointed by the Supreme Court. Three years must be spent in study by those who have not had a classical education. There must be satisfactory testimonials of good moral character.

Attorneys from other States, in order to be admitted to the Rhode Island Bar, if they have been in practice

less than three years, must be recommended by some counsellor of Rhode Island, must prove that the same time was spent in study as is required in Rhode Island, must study six months in the State, and pass a satisfactory examination. Attorneys from other States who have been in practice more than three and less than ten years are eligible for examination on recommendation of a Rhode Island attorney.

Attorneys who have been in practice more than ten years, may be admitted without examination by special permission of the Supreme Court.

South Carolina.

Applications for admission are made to the Supreme Court. The application should state that the applicant is a citizen of the State, twenty-one years old, and that he has read the course prescribed by the Supreme Court. In case other books have been read in place of those thus described, they should be named. The application should be accompanied by a certificate of a practicing attorney of the Supreme Court, that the applicant is a person of good moral character. The examination is conducted in writing. The following is the course of study prescribed :

Blackstone's Commentaries ; Kent's Commentaries ; Parsons, or Chitty, on Contracts ; Daniel on Negotiable Instruments, or Chitty on Bills ; Williams on Executors ; Tidd's Practice ; Pomeroy on Remedies ; Greenleaf on Evidence ; Story's Equity Jurisprudence ; Adams' Equity ; Daniel's Chancery Pleading and Practice ; Bishop on Criminal Law ; Constitution of the United States, Constitution of South Carolina, General Statutes of South Carolina, and all acts of a public nature passed since ; Rules of Supreme Court, Circuit and Probate Courts.

Attorneys from other States, upon producing satis-

factory proof thereof, are admitted to practice in the courts of a similar grade of South Carolina.

South Dakota.

Any person, of the age of twenty-one, an inhabitant of the State, who satisfies a court of record, on examination or by certificate of admission from any other State or Territory, that he possesses the requisite learning and is of good moral character, may be admitted to practice.

(A similar regulation prevails in North Dakota.)

Tennessee.

Any person may practice as an attorney before Justices of the Peace or the county courts, who is of good moral character and twenty-one years old. An examination must be passed before any two Judges or Chancellors by those who wish to practice in all the courts of the State. The faculty of any law school in the State has power to grant licenses to practice. Persons from other States are licensed in like manner, upon examination and satisfactory evidence as to age and character. Attorneys from other States, locating in Tennessee, are admitted to practice, upon producing license and satisfactory evidence of good character.

Texas.

Application can be made during the term of a District Court or of the Supreme Court, accompanied by a certificate from the County Commissioners' Court of the county in which the applicant resides, that he has been a resident of the State at least six months, that he is twenty-one years old, and is of good moral character. Thereupon an examination is held in open court by a committee of three or more practicing attorneys appointed for that purpose. The candidate is expected

to have studied Blackstone's Commentaries; Kent's Commentaries; Stephen, Gould, or Chitty on Pleading; Story's Equity Pleading; Parsons, Story, or Chitty on Contracts; 1 Greenleaf, Starkie, or Phillips on Evidence; Parsons or Daniel on Promissory Notes; Story or Gow on Partnership; Story's Equity Jurisprudence, or Adams' Equity; and he must have some general knowledge of the State Constitutions and Statutes, and of the rules of the District and Supreme Courts of the State.

Attorneys from other States locating in Texas, are admitted to practice upon producing a license of admission to practice in the States from which they came, together with satisfactory evidence of moral character.

Utah.

Any citizen of the United States, or any person who has *bona fide* declared his or her intention of becoming one, in the manner prescribed by law, of the age of twenty-one, of good character and the requisite learning and ability, may be admitted to practice. An examination is conducted in open court by a committee appointed by the Supreme Court. District Courts may admit persons to practice in their respective districts, upon like terms and in like manner. Attorneys who have been admitted to the highest court of any State or Territory, may be admitted without examination, upon affidavit to the fact of such admission or upon the production of a license.

Vermont.

Students are eligible for examination who have studied in the office of an attorney of the Supreme Court for *three* years next previous to their application, the last six months of which must be spent in the county where the applicant resides when the applica-

tion is made. Time spent in a law school shall be deemed an equivalent for time spent in an attorney's office, except for the last six months of the said three years. A student must file, as soon as possible, with the clerk of the court of the county in which he resides, a notice stating that he has commenced the study of law with the intention of becoming an attorney, and with whom and where he has commenced such study; also a certificate of the attorney with whom he is studying, stating that he is so engaged, and when such study began, and the three years commence from the filing of the notice and certificate. Every applicant must file, with the clerk of the court of the county where he resides, at least fourteen days before the session of the General Term of the Supreme Court, a petition for admission, verified by his affidavit, stating age, residence, time of study, and with whom and where such studies have been pursued. There must also be an affidavit of an attorney, stating that the applicant's studies have been actually pursued three years. Certificates of at least three attorneys are required that the applicant is of good moral character. Applicants are examined by a committee of the Bar, consisting of not less than three members. Examinations are both written and oral, and are conducted in public. The Supreme Court, upon sufficient cause shown, may allow study in an office outside the State as an equivalent for study in the State.

Attorneys from other States are admitted to practice in the courts of Vermont, without examination, on proof that they are attorneys of the highest courts of such other States; that they have practiced law one year as such, are of good character, and have resided for six months next preceding their application, in the county in Vermont where the application is made.

Virginia.

Any two Judges of the courts of Virginia, except Judges of county and corporation courts, may grant a license to practice law to any person who, on actual examination, shall be found duly qualified, and who shall produce a certificate from the court of any county or corporation that, to the personal knowledge of the Judge of such court, or from the information of creditable witnesses testifying on oath before such court, the court is satisfied that the applicant is a person of honest character, and twenty-one years of age.

Attorneys from other States and Territories may practice *as such* in the courts of Virginia. Such attorney must produce to each court in which he intends to practice, satisfactory evidence of his having been licensed in his own State, and when taking a license to practice in Virginia, must take the oath of fidelity to the Commonwealth.

Washington.

The following persons are entitled to practice as attorneys and counsellors in all courts of the States:

1. All citizens of the United States who present to any court of record a license from any court of record in any other State or Territory, showing that the person presenting the same has been duly admitted to practice in said court.

2. All citizens of the United States who are over twenty-one years of age and who shall present to any court of record in the State a diploma from a law school, and are found upon examination under the direction of the court, to possess the requisite qualifications of learning and ability.

3. All citizens of the United States, over the age of twenty-one years, of good moral character, and who possess the requisite qualifications of learning and

ability, and who shall be examined and admitted, according to the method prescribed by law. Applicants of the third class must apply for admission to the Supreme Court or some district court, and must show that they are of the age of twenty-one, which may be proved by their affidavit, that they are persons of good moral character, which may be proved by certified or other evidence satisfactory to the court, that they have diligently studied the common law and the laws of the State for at least eighteen months previous to the date of their application, under the direction of some practicing attorney of the State, the proof of which shall be the certificate of the attorney with whom the applicant has studied. The applicant is examined by the Judges, or under their direction, at the time at which application is made.

West Virginia.

The applicant must appear before the County Court of the county in which he has resided during the last preceding year, and prove to the satisfaction of the court that he is twenty-one years old, of good character, and that he has resided in said county for the year next preceding the date of his application. Upon such proof being made, an order to this effect is entered on the record of the court, and upon the production of a certified copy of the order, any three Judges of the higher courts of the State may give a full and thorough examination, and may give the applicant a license to practice.

Any attorney duly licensed in another State or Territory may practice *as such* in the courts of West Virginia upon producing satisfactory evidence of his having been thus licensed.

Graduates of the law school of West Virginia University, upon presenting the order before refer-

red to, together with diploma, shall be admitted to practice. .

Wisconsin.

Any person of good moral character and twenty-one years of age, who has studied law for *two* years, upon satisfactory proof of these facts, may be examined in open court or by a committee appointed for that purpose, and is admitted to practice if such examination is satisfactory.

Graduates of the law department of the University of Wisconsin are admitted to practice in all the courts of the State upon production of diploma.

All persons who have been admitted to practice in the Supreme Court of any other State or Territory, and who shall be residents of Wisconsin, may be admitted upon the production of their certificates to practice in such States or Territories.

Women are admitted to practice on the same terms as men.

Wyoming.

Any person, who is a citizen of the United States, who has read law for two years, one of which must be in the office of one of the Judges or of a regularly practicing attorney, who shall certify that the applicant is a person of good character and well qualified to practice law, and who satisfies any district court of his ability by an examination, may be admitted to practice. Any person admitted to practice in the District Court is admitted to practice in the Supreme Court upon motion.

Attorneys from other States locating in Wyoming are admitted to practice upon motion, on producing a certificate of admission and upon showing to the satisfaction of the court that they are in good standing and of good character.

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